84-35

No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PENYU BAYCHEV KOSTADINOV,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Is the 1963 Bi-lateral Agreement, incident to the claims settlement between Bulgaria and the United States, pursuant to which the United States authorized the Bulgarian mission to establish the Office of the Commercial Counselor in New York as an integral part of the Bulgarian mission, an international compact binding on the United States?

2. Can the United States, consistent with its adherence to the Vienna Convention on Diplomatic Relations, deny diplomatic privileges and immunities to a person notified to it as a member of the staff of a mission of a foreign state for the sole reason that the member of the mission staff works in a mission office in New York rather than Washington, when: (a) pursuant to the Bi-lateral Agreement that office was established in New York as an integral part of the mission with the express consent of the United States; (b) the member of the mission staff was duly notified to and accepted by the United States; and, (c) the function performed by the member of the mission staff if carried out in Washington, D.C., would concededly entitle him to immunity from the criminal jurisdiction under the Vienna Convention?

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Penyu Baychev Kostadinov, Assistant Commercial Counselor of the Bulgarian Embassy to the United States, petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, reversing the judgment of the United States District Court for the Southern District of New York that he is immune from the criminal jurisdiction of the United States by the terms of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, TIAS 7502, 500 U.N.T.S. 95.

Opinions Below

The opinion of the Court of Appeals, reversing, is reprinted as Appendix A. The opinion of the District Court granting the motion to dismiss on grounds of immunity, delivered orally, is reprinted as Appendix B.

Jurisdiction

The Opinion and Order of the Second Circuit Court of Appeals issued May 10, 1984. This Court has jurisdiction under 28 U.S.C. §1254(1).

Statutory and Treaty Provisions Involved

We rely throughout this petition on the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, TIAS 7502, 500 U.N.T.S. 95, enacted as domestic law by the Diplomatic Relations Act, 22 U.S.C. §254, and applicable to the facts of this case by virtue of the Bi-lateral Agreement between Bulgaria and the United States pursuant to which the Legation of Bulgaria was authorized to establish in New York a Commercial Counselor's office as an integral part of the mission. The relevant texts are reprinted as Appendix C.

Statement of the Case

Penyu Baychev Kostadinov is a 41-year old Bulgarian official specializing in foreign trade. He has been detained since September 23, 1983 on an indictment, returned in the United States District Court for the Southern District of New York on September 26, 1983, charging conspiracy to attempt to commit and to commit espionage, and attempted espionage, 18 U.S.C. §794(a) and (c). Mr. Kostadinov has pleaded Not Guilty. Both Mr. Kostadinov and the Government of Bulgaria have invoked his immunity from the criminal jurisdiction of the United States from the first opportunity. Bulgaria has, in numerous notes and conversations, strongly protested to the United States Kostadinov's detention as a violation of United States obligations under international law. The United States, while rejecting the claim of immunity, has replied to Bulgaria that under 22 U.S.C.

§254, the Diplomatic Relations Act, such determinations are exclusively within the province of the judiciary. The case presents the first interpretation by the United States courts of the provisions of the Vienna Convention on Diplomatic Relations concerning diplomatic immunity from the criminal jurisdiction. We seek certiorari because the opinion of the Court of Appeals reversing the District Court and denying immunity misconstrues the 1963 agreement between Bulgaria and the United States, and is a seriously flawed interpretation of the Vienna Convention.

On May 5, 1979, Bulgaria notified the United States that "Penyu Baychev Kostadinov [is] appointed employee in the commercial service of the Embassy of the People's Republic of Bulgaria in Washington . . . to occupy his post in replacement of Stefan Petrov Kossev." As was known to the United States, Mr. Kossev worked in the office of the Embassy's Commercial Counselor in New York. Mr. Kostadinov was issued an A-2 (foreign official) visa and commenced his duties as Assistant Commercial Counselor in the Embassy's New York office on July 3, 1979. In notifying the United States Department of State of Bulgarian government-related employees in the United States (Form DS-394), Mr. Kostadinov's position was specified as "Assistant Commercial Counselor", employed by the "Bulgarian Embassy, Commercial Counselor's Office", performing his duties at "50 E. 42 Str., Room 1501, NYC, NY."

On March 24, 1959, the United States resumed diplomatic relations with Bulgaria. The Memorandum of Understanding regarding the resumption of diplomatic relations, provided, among other things, that:

> the representatives agree that members of the staff of the diplomatic missions of each country who are nationals of the sending country shall enjoy in the territory of the other the privileges and immunities derived from generally recognized international law and practice.

In July 1963, after two years of intensive negotiations and ancillary to the 1959 agreement for the resumption of diplomatic relations, the United States and Bulgaria concluded an agreement described by the United States Minister to Bulgaria as "on financial claims and related issues", (the Bi-lateral Agreement). The United States Minister to Bulgaria signed the agreement for the United States. As part of this transaction, the United States authorized "the Legation of the People's Republic of Bulgaria to establish in New York a commercial office which would have the purpose of promoting trade between the two countries." The statement which authorized the opening of the office in New York was sent by the Legation of the United States in Sofia to the Ministry of Foreign Affairs of Bulgaria accompanied by a formal diplomatic note impressed with the seal of the United States Legation and initialed by the United States Minister to Bulgaria. In the course of the negotiations which culminated in the Bi-lateral Agreement, the United States made known to Bulgaria that the agreement to open the New York office would be made in a press release which, while not a "integral part" of the claims agreement would constitute "an associated feature of the general settlement" of claims. The State Department in an internal publication reporting on the claims agreement, described the Statement authorizing the Bulgarian Legation to open a trade office in New York as "one of our bargaining levers during the negotiation."

The District Court, after extensive hearings found:

> that the entire context of the negotiations and the relationship of the discussion of the trade office in the context of the claims settlement agreement indicates that the agreement on the part of the United States to permit the Bulgarian Legation to open a trade office in New York was an essential part of the total agreement and that it constituted a binding agreement under international law, and that Bulgaria was, therefore,

> expressly authorized by the United States to have its Legation open a commercial office in New York.

App. B at 31a.

The Court of Appeals, *en passant*, and in total disregard of the record, concluded that "certainly a press release is not a bi-lateral agreement", thus casually waiving aside a solemn international compact entered into in good faith by the United States and Bulgaria as part of the claims settlement.

The Bi-lateral Agreement has never been terminated. Following on the authorization, the Commercial Office of the Bulgarian mission was opened in New York and was composed of mission staff transferred from the Washington Legation.

Sometime *after* the July 1963 agreement, and no later than the Spring of 1964, a disagreement arose between Bulgaria and the United States over the immunity status of the mission personnel transferred from Washington to the New York commercial office. The United States stated that it would only recognize full diplomatic immunity for the head of the New York office (the Commercial Counselor), while Bulgaria insisted that the subordinate administrative and technical personnel enjoyed the same immunity they were recognized to have while in Washington. The record below reflected acknowledgment by the State Department, in a 1973 letter to the Bulgarian Embassy and in internal memoranda of 1968 and 1973, that the New York office was part of the Embassy while reiterating the State Department's position on the immunity status of subordinate commercial office personnel.

In 1972 the President ratified the Vienna Convention on Diplomatic Relations, and in 1978 the Congress codified the Vienna Convention as domestic law in the Diplomatic Relations Act, 22 U.S.C. §254. Partially in response to these events, in 1974, 1977 and 1978 the State Department sent

circular notes to all chiefs of missions in Washington, including Bulgaria, stating its position that embassy staff entitled to diplomatic privileges and immunities must reside in Washington, D.C. The State Department's position on the immunity status of New York subordinate commercial office employees was repeated in an exchange with Bulgaria in 1981. Bulgaria, through this period, continued to insist that, because its Commercial Office in New York was, by the Bi-lateral Agreement, part of its Embassy, subordinate officials would have the same privileges and immunities concededly enjoyed by officials exercising the same functions in Washington. While the Executive Branch of the United States Government continued to adhere to its position on the status of subordinate commercial staff in New York, the District Court for the Southern District of New York in 1978 adopted the position (in a civil case) that—given the ratification of the Vienna Convention and the enactment of the Diplomatic Relations Act—such subordinate staff of an Embassy commercial office in New York enjoyed all the immunities enjoyed by persons occupying the same positions in Washington, D.C. *Vulcan Iron Works* v. *Polish American Machinery Corp.*, 472 F. Supp. 77 (S.D.N.Y., 1979), *rev'd on other grounds on reconsideration*, 479 F. Supp. 1060 (S.D.N.Y., 1979).

This situation prevailed when Mr. Kostadinov arrived to take up his duties as Assistant Commercial Counselor in the Office of the Commercial Counselor of the Bulgarian Embassy in New York in 1979. The District Court found that Mr. Kostadinov consistently was notified to and accepted by the United States as Assistant Commercial Counselor of the Bulgarian Embassy's Commercial Counselor's Office in New York. And, critically, in a 1968 memorandum relied upon by the District Court, the State Department stated that persons employed in the commercial office of an Embassy in New York shall "be staff members of the Embassy assigned to the commercial office." As the District Court said, "[T]he memorandum also suggests that 'per-

sons applying for visas outside the United States for assignment to the Commercial Office of an Embassy should indicate that they will be staff members of the Embassy assigned to the Commercial Office.'" App. B. at 32a. In making his application for a visa Mr. Kostadinov and his Government followed the procedures of this memorandum exactly. These procedures are consistent, as well, with Article 10 of the Vienna Convention (see *infra* pp. 17-18).

This factual record was wholly ignored by the Court of Appeals in reaching its decision that, while the New York office is "mission premises," the persons there employed are not members of the mission staff.

Reasons for Granting the Writ

This case, of first impression, involves important rights asserted in reliance upon federal treaty obligations. The Court of Appeals opinion, repudiating the solemn obligations of the 1963 Bi-lateral Agreement between Bulgaria and the United States, cannot be reconciled with the doctrine of this Court as expressed in *United States* v. *Belmont*, 301 U.S. 324 (1937) and *United States* v. *Pink*, 315 U.S. 203 (1942). The unsupported and erroneous interpretation of the Vienna Convention by the Court of Appeals compromises the confidence which over a hundred States have reposed in the treaty; stating their belief "that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." App. C at 52a.

In the following sections, we first analyse the consequences and effect of the Bi-lateral Agreement negotiated with Bulgaria in 1963, and then in that context address the obligations of the United States under the Vienna Convention on Diplomatic Relations.

1. The Bi-lateral Agreement, Incident to the Claims Settlement Between Bulgaria and the United States, in Which the Bulgarian Mission Was Authorized to Establish the Office of Its Commercial Counselor in New York Is an International Compact Requiring the United States to Recognize the Office As Part of the Mission and Its Employees as Members of the Mission Staff

Agreements constituting international compacts binding upon the United States have taken varied and composite forms. As this Court held in *United States* v. *Belmont,* 301 U.S. 324, 330-31 (1937):

> A treaty signifies 'a compact made between two or more independent nations, with a view to the public welfare.' *B. Altman & Co.* v. *United States,* 224 U.S. 583, 600, 32 S.Ct. 593, 596, 56 L.Ed. 894. But an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations.

In *United States* v. *Pink,* 315 U.S. 203, 223 (1942), this Court found "that recognition of the Soviet Government, the establishment of diplomatic relations with it, and the Litvinov Assignment were 'all parts of one transaction, resulting in an international compact between the two governments' [Quoting *Belmont, supra.*]."As with the Bi-lateral Agreement between Bulgaria and the United States, several different acts and declarations together constituted the single product of the negotiations between the Sovereigns.* It is the intention of the signatories that is decisive, not the form in which their intentions are expressed. The "Litvinov Assignment" was a letter. More recently the Court has found that the agreement terminating the Iranian hostage crisis is a binding international compact, although composed of various parts and embodied in the form of two

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* See, Appendix C at 80a.

"Declarations" of a third state, the Democratic and Popular Republic of Algeria. *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). It is well established that the President may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause of the Constitution. *See Weinberger* v. *Rossi*, 456 U.S. 25 (1982).

In light of these precedents, the Court of Appeals dismissal of an essential element of the Bi-lateral Agreement as something "merely contained in a press release issued by the United States . . ." is a serious error, not only because it contradicts the established doctrine of this Court but because it denigrates the treaty obligations of the United States. Those obligations, set forth in the Bi-lateral Agreement, were expressed in the agreement as a whole. To discard one essential part of the Bi-lateral Agreement, as did the Court of Appeals, destroys the good faith that underlay the motives of both governments. As the record shows, without agreement on the entire transaction, including each of its parts, there would have been no claims settlement—the objective sought by the States on behalf of its nationals.

The record below established that the authorization of the establishment in New York of the Bulgarian mission's commercial office was a *quid pro quo* for the claims settlement sought by the United States. The statement referring to that authorization was variously characterized by the State Department as a "bargaining lever" and an "associated feature" of the claims settlement. Even the language of the release was bargained for in return for specific changes in the language of the claims settlement agreement.

The manner in which the principles in *Belmont* and *Pink* should be applied to circumstances such as those existing in this case was clearly enunciated by the United States Court of Appeals for the Fourth Circuit in *United States* v. *County of Arlington*, 669 F.2d 925 (4th Cir.), *appeal dismissed, cert. denied*, 459 U.S. 801 (1982). That decision

is in sharp variance with the attitude of the Court of Appeals in this case.

The consequences of this error are crucial and lead to the subsequent misconstruction of the Vienna Convention by the Court of Appeals. Since the United States had entered into a binding agreement with Bulgaria authorizing the Bulgarian mission to open its commercial office in New York, the United States could not unilaterally later withdraw the authorization, explicitly or implicitly. Indeed, the State Department in the intervening years since the 1963 agreement has acknowledged that the premises occupied by the New York office are "part of the Embassy", that the New York commercial office has "diplomatic status" and that persons assigned to the New York commercial office are "staff members of the Embassy." In the face of this record, the decision of the Court of Appeals that under the Vienna Convention the United States had rejected the employees of the commercial office as members of the mission and therefore validly denied the required privileges and immunities is flawed thrice-over. First, the United States never claimed that the commercial office employees were other than mission staff and, in the only reference in the record, stated the opposite. Second, the Bi-lateral Agreement required the United States to consider, as it did, the commercial office in New York to be part of the mission and the employees of the office to be members of the mission staff. Third, as we demonstrate below, the language and history of the Vienna Convention require that the members of administrative and technical staffs of a commercial office which is part of a mission be accorded immunity from the criminal jurisdiction.*

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* It seems appropriate to comment on the statements by the District Court and the Court of Appeals regarding the immunity status of personnel of the New York office prior to the adoption of the Vienna Convention. The District Court said: "It is probable that this court would have been concluded by the suggestion that

(footnote continued on following page)

The construction adopted by the Court of Appeals that the premises in New York are mission premises but that the personnel are not staff members of the mission conflicts with the intent of the parties to the agreement as shown by the record below. "[W]e are aware of no rule of interpretation applicable to treaties, or to private contracts, which would authorize the Court to make exceptions by construction, where the parties to the contract have not thought proper to make them." *The Society for the Propagation of the Gospel in Foreign Parts* v. *New Haven,* 8 Wheaton 464, 490 (1823). The United States has not revoked or abrogated the 1963 agreement. The partial abrogation worked, *sub silentio,* by the opinion of the Court of Appeals requires review.

(footnote continued from previous page)

Mr. Kostadinov had no immunity if that suggestion had been made prior to the time that the Vienna Convention was enacted." We assume that the Court of Appeals' statement that "It appears that prior to the Convention there would be no question as to the power of the United States to deny diplomatic immunity to Kostadinov" means the same thing, namely, that prior to the Vienna Convention, the judiciary would have been "concluded" by the suggestion of the Executive. *See In re Baiz,* 135 U.S. 403 (1890). It should be pointed out, however, that there is a distinction between power and right. In light of the Bi-lateral Agreement, any suggestion prior to 1978 that members of the staff of the Embassy were not entitled to immunity from criminal prosecution would have violated the law in force since the earliest days of the Republic, 22 U.S.C. §252 *et. seq.,* pursuant to which all members of the staff of an Embassy (regardless of rank) and their families and servants were entitled to immunity from all civil and criminal process. That statute was a codification of the then prevailing international law. Thus Bulgaria had a right to believe, as it did, that the personnel of its Embassy notified to and accepted by the United States as members of the staff of the Embassy, were entitled to the privileges and immunities established by law. It is conceded that no view to the contrary was expressed to Bulgaria before or during negotiations leading to the Bi-lateral Agreement and no exceptions to the law were written into the agreement, which has never been terminated.

2. The Vienna Convention on Diplomatic Relations Requires That the United States Grant Immunity From the Criminal Jurisdiction to a Person Employed by a Foreign Mission and Notified to the United States as a Member of Its Administrative and Technical Staff in a Mission Office in New York Where: (A) The Office Was Established in New York as an Integral Part of the Mission With the Express Consent of the United States; (B) The Member of the Mission's Administrative and Technical Staff Was Notified to and Accepted by the United States; (C) The Function Performed by the Member of the Mission, if Carried Out in Washington, Would Concededly Entail Immunity From Criminal Prosecution Under the Vienna Convention

In 1972, the President ratified the Vienna Convention on Diplomatic Relations with the advice and consent of the Senate. In 1978, the Congress enacted the Diplomatic Relations Act which provides, *inter alia*, that "[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . shall be dismissed." 22 U.S.C. §254(d).* This case is the first in which United States courts have been called upon to interpret the Vienna Convention on a claim of immunity from the criminal jurisdiction advanced by a person for whom a foreign sovereign, and party to the Convention, has assert-

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* Under Article 37(2) of the Vienna Convention, members of the "administrative and technical staff" of the mission "enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdicton . . . specified in ¶1 of Article 31 shall not extend to acts performed outside the course of their duties."

Article 29 provides that:

> The person of the diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 31 provides, *inter alia*, that "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State."

ed the privileges and immunities due to a member of its mission in the United States.*

The critical error of the Court of Appeals lay in its failure to comprehend the nature and effect of the Bi-lateral Agreement. The artificial dichotomy made between the premises of the mission and the members of the staff of the mission is wholly without support in the record and clearly without basis in the context of the Bi-lateral Agreement.** This caused the Court of Appeals to misread the history of the negotiation of the Vienna Convention as to the status of commercial officers attached to missions, and then misconstrue the provisions of the Vienna Convention governing limits on the size of mission, the establishment of mission offices outside of the capital, and notification, acceptance and rejection of persons appointed as mission staff.

The International Law Commission, an agency of the United Nations, in its 1957 and 1958 sessions produced draft articles and a commentary that provided the basis for the deliberations in Vienna and their product, the Convention on Diplomatic Relations. The draft articles and the Vienna Convention itself (Article 3, ¶1(e)), establish that the development of economic relations between the sending and receiving states is among the functions of a diplomatic mission. A proposal was made to the Interna-

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* The position of the District Court that treaty interpretation is a judicial function, and that the meaning attributed to treaty provisions by the executive may be found to be incorrect, is in accord with a fundamental line of authority. *See United States* v. *Schooner Peggy*, 1 Cranch 103 (1803); *United States* v. *Perchemann*, 7 Peters 57 (1833); *United States* v. *Fitzpatrick*, 214 F. Supp. 425 (S.D.N.Y. 1963). The Court of Appeals accepted that, at least after the passage of 22 U.S.C. 254(d), the United States is without power to deny immunities to persons granted immunities by the Vienna Convention, and, implicitly, that the determination is for the judiciary.

** Throughout the proceedings in the District Court, the United States denied that the Bulgarian Trade Office in New York is part of the Bulgarian Embassy. In the Court of Appeals, however, the United States stated that "for the purposes of this appeal we do not challenge the District Court's finding that the trade office is 'part of the Embassy' and therefore that its premises are inviolable."

tional Law Commission that persons exercising commercial functions be excluded from the coverage of the Convention. The ensuing debate showed virtually no support for this view and the International Law Commission rejected the proposal. The governing standard was expressed by the Chairman of the Commission: "If a trade mission was a part of a diplomatic mission, its members would automatically enjoy diplomatic status. If, on the other hand, a trade mission was a distinct body its members would not automatically enjoy diplomatic status." Year Book of International Law Commission 1958, Vol. 1, p. 110, ¶47. The commentary adopted by the International Law Commission states the same clear standard; persons exercising commercial functions who are attached to, or part of, a diplomatic mission ("commercial attachés") are covered by the Convention; persons exercising commercial functions but not attached to a diplomatic mission ("commercial representation as such") are not covered.

In view of this resolution of the question, the finding of the Court of Appeals that "[i]t is perfectly clear that commercial representation is not covered by the Convention" is a misstatement of the intent of the parties to the Vienna Convention. In this regard, it should be noted that the United States has "commercial" or "economic" officers, and supporting administrative and technical staff, attached to our missions to foreign states. The position of the United States is that these officials are entitled to immunity from the criminal jurisdiction pursuant to the Vienna Convention. And the United States acknowledges the Vienna Convention status, as administrative and technical staff of a mission, of persons who reside in Washington, D.C. and exercise the functions that Mr. Kostadinov exercised in New York. In the district court, the United States conceded that staff of the Bulgarian Commercial Counselor—if only they were to reside in Washington, D.C.—were, and would be, acknowledged to enjoy immunity from criminal prosecution under the Vienna Convention. Insofar as the Court of

Appeals denied immunity to Mr. Kostadinov because "[i]t is perfectly clear" that his *functions* are "not covered by the Convention," the opinion ignores not merely the clear meaning of the Convention but United States practice to date.

The mistaken holding of the Court of Appeals on the scope of the coverage of the Vienna Convention cannot be saved by the term "representation." The United States has defined the role of its many "Commercial Officers" attached to our missions abroad as follows: "At larger posts, Commercial Officers *represent* U.S. commercial interests within their country of assignment." (emphasis supplied) Key Officers of Foreign Service Posts, Department of State Publication 7877, Revised January 1984. In light of the above, the Court of Appeals opinion that "it is perfectly clear that commercial representation is not covered by the Convention" is more than a misunderstanding of the language and history of the Vienna Convention and a distorted reflection of general international practice, but pregnant with mischief. This mistaken finding should not be permitted to represent the United States position without review.

The Vienna Convention provisions on limits on the size of missions (Article 11) were innovative, and considerable debate took place. The Court of Appeals wholly misconstrued these provisions in finding authority under Article 11 for the denial of privileges and immunities to Mr. Kostadinov. Article 11 permits the receiving state to limit the size of a mission and to refuse to accept officials of a particular category. The Court of Appeals, simultaneously misconstruing both provisions of Article 11, found that the United States had "limited the size of the Bulgarian mission by refusing to accept as members of the mission officials of a certain category, namely, assistant commercial counselors based in New York." App. A at 19a. First, addition of the phrase "as members of the mission" to the language of Article 11 is a logical, historical and factual error. This

interpretation of Article 11, that the "limits" referred to go to the extension of privileges and immunities rather than to numbers, is unsupportable in the history of, or debates on, the Vienna Convention. The leading treatise on the Vienna Convention, *Diplomatic Law* (1976), by Eileen Denza, having first reviewed the history of the Article, forcefully states the opposite conclusion that Article 11 "was the first attempt to deal with [the problem of unreasonably large missions] by requiring restriction of numbers *instead of by reduction of privileges and immunities*". (emphasis supplied) E. Denza, Diplomatic Law (1976), p. 48.

The District Court correctly stated the law and facts:

> Under Article 11 of the Vienna Convention, a receiving state, in this case the United States, has discretion over the size of the mission, over the numbers of persons at the mission. There is nothing in the Vienna Convention, however, that gives the receiving state control over the question of privileges and immunities. The Vienna Convention in this particular departs from history. It makes it very clear that a receiving state may limit size. It gives no authority to a receiving state to withhold privileges. . . . This record indicates that the Department of State has made no effort to limit the numbers of persons working in the Office of the Commercial Counselor in New York.

App. B at 42a-43a.

The second misinterpretation of Article 11, that "officials of a certain category" refers to a geographical ("based in New York") rather than functional "category" is no less mistaken. The debates on the section refer exclusively to functional categories. The geographical question is dealt with in Article 12, not Article 11, of the Convention. Article 12 provides that "the sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those

in which the mission itself is established." Again, the record is unambiguous; in 1963 the United States gave express consent to Bulgaria to establish, in New York, the office of the Commercial Counselor as part of the mission.*

The entire mistaken project of distinguishing the physical space (accepted by the United States as part of the mission) from the staff (as "rejected" by the United States as staff members of the mission) founders on the fact that the State Department explicitly considered the New York commercial office staff to be staff members of the Embassy. This crucial statement, quoted in the District Court opinion and neither acknowledged nor distinguished by the Court of Appeals, reads as follows: "[P]ersons applying for visas outside the United States to enter the United States for assignment to the [New York] commercial office of the Embassy should indicate *that they will be staff members of the Embassy assigned to the commercial office.*" (emphasis supplied) App. B at 32a. Mr. Kostadinov followed exactly this State Department procedure. *Cf. United States* v. *Dizdar*, 581 F.2d 1031 (2d Cir. 1978).

Although Mr. Kostadinov and his government complied with State Department procedure for notification and with Article 10 of the Vienna Convention, the Court of Appeals reaches the conclusion that the United States made "clear" that Mr. Kostadinov was not "acceptable", thus allegedly complying with Article 9 of the Vienna Convention. Article 7 of the Vienna Convention provides that, subject to various other provisions, "the sending State may freely appoint the members of the staff of the mission." Article 9 of the Vienna Convention authorizes the receiving state to declare any member of the staff of a mission notified to it to be "not acceptable," in which case the sending State must recall the person concerned or terminate his or her

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* The Court of Appeals acknowledges that the language of Article 12 is inconsistent with its opinion. A "mission" includes people. Therefore, "offices forming part of the mission" must necessarily include mission staff. This the State Department understood. *See* App. B at 32a.

functions with the mission. Article 10 requires that a sending State notify the appointment of the members of the mission, their arrival and departure and, where possible, give prior notification of arrival and departure. There is no dispute that Bulgaria appointed Mr. Kostadinov "in the commercial service of the Embassy of the People's Republic of Bulgaria in Washington" and so notified the United States prior to his arrival.* The District Court found that it is "abundantly clear from the record before me that the Department of State knew precisely where Mr. Kostadinov would be working and in what capacity." App. B at 46a. The District Court went on to find "that Mr. Kostadinov complied with notification requirements, nor did the United States specifically object in the ways prescribed in the convention. It never declared him unacceptable . . . [i]t never expressed any objection to Mr. Kostadinov or to him serving in the position of assistant commercial counselor." App. B at 47a.

The United States is bound by the 1963 accord with Bulgaria to acknowledge that the office of the Embassy's Commercial Counselor in New York is an integral part of the Bulgarian mission to the United States. The United States, in fact, accepted that the staff of the office were "staff member[s] of the Embassy". Bulgaria's notification of Mr.

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* The Court of Appeals misstated the record when it found:

> Kostadinov argues that he is a 'member of the staff of the mission' under the convention, for he works in the New York trade office, which is housed in mission premises. Since mission premises and the mission itself are independent concepts, however, it does not follow that his working in mission premises requires the conclusion that Kostadinov is a member of the mission.
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> App. A at 11a.

Neither Mr. Kostadinov nor his Government have ever argued that he is entitled to immunity from criminal prosecution merely because he works in the premises of the mission. That entire concept has been artificially created by the Court of Appeals without a single citation to the record to support it. Mr. Kostadinov's claim to immunity is based upon his notification to and acceptance by the United States as a member of the staff of the mission.

Kostadinov as a member of the staff of the mission was precisely in accord with the Vienna Convention, Articles 7 and 10. The United States never notified Bulgaria that Mr. Kostadinov was "not acceptable" in accord with Article 9; and in fact, accepted Mr. Kostadinov, issuing three visas with knowledge of his notification *as a member of the staff of the Embassy.*

Yet the Court of Appeals reversed the District Court's recognition of Mr. Kostadinov's right to immunity under the Vienna Convention, adopting a distorted interpretation in full disregard of the record in the case. This decision, violative of international law, now stands as the sole opinion of a United States Court of Appeals on questions of great international interest and consequence, and therefore, merits review.

CONCLUSION

For all the above reasons, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

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Dated: July 9, 1984

APPENDICES

Appendix A—Opinion of U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1133—August Term 1983

Argued: April 11, 1984 Decided: May 10, 1984

Docket Nos. 84-1042, 84-1092

UNITED STATES OF AMERICA,

Appellant,

—against—

PENYU BAYCHEV KOSTADINOV,

Defendant-Appellee.

Before:

TIMBERS and PRATT, *Circuit Judges*,
and METZNER, *District Judge.**

* Hon. Charles M. Metzner, of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from an order dismissing an indictment by the United States District Court for the Southern District of New York, Vincent L. Broderick, *Judge*, on the ground that the defendant is immune from criminal prosecution by virtue of diplomatic immunity.

Order reversed and the indictment reinstated.

APPEARANCES:

RUTH GLUSHIEN WEDGWOOD, Assistant United States Attorney for the Southern District of New York, New York (Rudolph W. Giuliani, United States Attorney, Paul Shechtman, Assistant United States Attorney, New York, New York, of counsel), *for Appellant*.

MARTIN POPPER, New York, New York (John Mage, Wolf Popper Ross Wolf & Jones, New York, New York, of counsel), *for Defendant-Appellee*.

METZNER, *District Judge*:

The United States appeals from an order of the United States District Court for the Southern District of New York, Vincent L. Broderick, Judge, dismissing an espionage indictment against the appellee on the ground that the defendant is fully immune from the criminal jurisdiction of the United States by virtue of diplomatic immunity. Vienna Convention on Diplomatic Relations,

23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, and 22 U.S.C. § 254d (1982) (Convention). For the reasons stated below, we reverse.

I. *The facts leading to this appeal*

Appellee, Penyu Baychev Kostadinov, is an employee of the Bulgarian Ministry of Foreign Trade, and serves as an assistant commercial counselor in that country's New York trade office. With the permission of the United States, the Bulgarian Legation (later Embassy) in Washington opened the New York office in 1963 for the purpose of promoting trade between the two countries. Bulgaria designated a commercial counselor to head up this office, and he was specifically granted diplomatic immunity by the United States Government. This government recognizes the premises housing the New York office as part of the premises of the Bulgarian Embassy in Washington.

The record reflects that on September 23, 1983, Kostadinov met with another individual in a restaurant in Manhattan. There he purchased from that individual a secret document entitled "Report on Inspection of Nevada Operations Office," which concerned various security procedures for American nuclear weapons. At that meeting Kostadinov paid the individual $300, arranged to meet the person again to make further payment, and gave the person a list of thirty additional classified documents which Kostadinov wanted to acquire. Unbeknown to Kostadinov, the individual had been providing information to the Federal Bureau of Investigation, whose agents recorded the meeting on audio and videotape. FBI agents arrested Kostadinov as he left the meeting. He subsequently was indicted on one count of attempted espionage, 18 U.S.C. § 794(a) (1982),

and one count of conspiracy to commit espionage, 18 U.S.C. § 794(c) (1982).

Kostadinov moved before Judge Broderick to dismiss the indictment, claiming that he had diplomatic immunity from criminal prosecution under the provisions of the Convention. Judge Broderick granted Kostadinov's motion, finding that since the New York trade office at which Kostadinov worked was a part of the Bulgarian Embassy, the title "assistant commercial counselor" makes him a member of the staff of the "embassy"[1] as defined by the Convention, entitling him to immunity.[2]

II. *The Vienna Convention*

A. *Provisions and history*

The sole issue on this appeal is whether, under the provisions of the Convention, approved by the Senate in 1965 and ultimately ratified by this country in 1972, as well as 22 U.S.C. § 254d, Kostadinov was a member of the Bulgarian mission immune from criminal prosecution in this country. It appears that prior to the Convention there would be no question as to the power of the United States to deny diplomatic immunity to Kostadinov. Section 254d provides that an indictment against an individual protected by the Convention shall be dismissed.

Under the Convention, diplomatic privileges and immunities are determined with reference to a country's "mission" abroad, but nowhere does the Convention

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1 The court below used the word "embassy," which is the term generally used. However, the Convention refers only to "mission" which will be used in this opinion.

2 Kostadinov relies on an opinion by Judge Lasker who previously adopted similar reasoning, in a civil setting. *Vulcan Iron Works v. Polish American Machinery Corp.*, 472 F. Supp. (S.D.N.Y.), *rev'd on other grounds on reconsideration*, 479 F. Supp. 1060 (S.D.N.Y. 1979).

expressly define the term "mission." Article 1 does define the "members of the mission" as "the head of the mission and the members of the staff of the mission," which includes "the diplomatic staff . . . the administrative and technical staff and . . . the service staff of the mission . . . ." The "administrative and technical staff," in turn, is defined as "the members of the staff of the mission employed in the administrative and technical service of the mission . . . ." It is to this group that Kostadinov claims to belong, and indeed, Article 3 lists one of the functions of a diplomatic mission as "developing" the "economic" relations between the sending and receiving states.[3]

Article 7 provides, in pertinent part, that subject to Articles 9 and 11, "the sending State may freely appoint the members of the staff of the mission." Article 9 states that:

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3 In its 1958 discussion of draft Article 3 (later adopted in virtually identical form as final Article 3), the International Law Commission recognized that nations often sent abroad commercial representatives whose entitlement to diplomatic immunities varied from country to country. The rapporteur had proposed a commentary stating in part that "[a]n overlapping of functions may easily occur in the course of co-operation between the trade delegations and the diplomatic mission, which will make it difficult to determine whether the trade delegation or its members have been notified as belonging rightly to the mission." The draft commentary also observed that the subject of trade representatives was not suitable for treatment "by general provisions," but was more appropriately covered by "commercial treaties." *Summary Records of the International Law Commission,* [1958] 1 Y.B. Int'l L. Comm'n 110.

After heated debate over the proper status of trade representatives, reflecting the fact that various nations treated them differently, *Summary Records* at 110-11, 235, the Commission adopted a simple commentary. It wrote that "[w]ith regard to trade missions, it should be noted that the question of commercial representation as such—i.e., apart from the commercial attaches of a diplomatic mission—is not dealt with in the draft because it is usually governed by bilateral agreement." *Report of the International Law Commission to the General Assembly,* [1958] 2 Y.B. Int'l L. Comm'n 90.

"1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission."

Article 11 provides that:

"1. In the absence of the specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.

2. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category."

The above provisions are better understood after examining the groundwork performed by the International Law Commission (Commission) and the discussions by the delegates to the Vienna Conference which prepared the Convention.

In 1954 the Commission, an agency of the United Nations, initiated work on the subject, and appointed a "special rapporteur" to prepare a set of draft articles, with a commentary. In 1957 the Commission adopted a provisional set of articles, with an official commentary, and submitted its work to the Secretary-General of the United Nations, with a request that he transmit them to constituent governments for their observations. The General Assembly's Sixth Committee also reviewed the draft.

In 1958, after having received various comments in response to its 1957 draft, the Commission adopted draft articles and the rapporteur's commentary, and forwarded its work to the General Assembly with a recommendation that U.N. member states conclude an international convention based upon the draft. *See generally Report of the Interntional Law Commission to the General Assembly*, [1958] 2 Y.B. Int'l L. Comm'n 89 (*Report*), and sources cited therein.

In 1959 the General Assembly requested the Secretary-General to convene a conference in Vienna by the spring of 1961, in order to prepare a convention on diplomatic intercourse and immunities. The Assembly specifically referred to the Vienna Conference the Commission's 1958 report, comprising both the draft articles and the rapporteur's commentary, "as the basis for its consideration of the question of diplomatic intercourse and immunities." G.A. Res. 1450(XIV), 7 December 1959.

The Vienna Conference met and produced the Vienna Convention on Diplomatic Relations.

The background material illuminates what we believe to have been a misconception by the district court of the meaning of the term "mission" in the Convention. The court placed emphasis on the physical aspect of a "mis-

sion." Under the Convention, a "mission" consists of a group of people sent by one state to another; it does not refer to the premises which they occupy in the receiving state. This is made clear by the rapporteur's commentary to Article 6 of the Commission's draft, which was later adopted as Article 7 of the Convention. In his commentary to that draft article the rapporteur wrote:

> "While it is the sending State which appoints *the persons who comprise the mission*, the choice of these persons . . . may considerably affect relations between the States, and it is clearly in the interests of both States that the mission should not contain members whom the receiving State finds unacceptable."

Report at 91 (emphasis added). In a similar fashion, the commentary to draft Article 10 (final 11) observes that one of the "questions connected with the mission's composition which may cause difficulty" is "that of the choice of *the persons comprising the mission*." Report at 92 (emphasis added).

In the general commentary to the draft articles, the rapporteur stated that diplomatic privileges and immunities may be divided into three groups: "(a) Those relating to the premises of the mission and its archives; (b) Those relating to the work of the mission; (c) Personal privileges and immunities." *Report* at 94-95. In this case we are concerned with (c).

Draft Article 19 (final 21) speaks of the receiving state's obligation to assist the sending state to acquire the "premises necessary for its mission," and the rapporteur's commentary again draws the distinction between the mission and the physical premises which it uses, speaking of potential problems rendering it difficult "for a mission to

acquire the premises necessary to it." *Report* at 95. Draft Article 20 (final 22) delineates the immunity which attaches to the premises of a mission, which are expressly defined by the rapporteur as including "the buildings or parts of buildings used for the purposes of the mission, whether they are owned by the sending State or by a third party acting for its account, or are leased or rented"; the premises are used "as the headquarters of the mission." *Report* at 95. Draft Article 43 (final 45) observes that while a *mission* may be recalled, the receiving state must "protect the premises of the mission," or the sending state "may entrust the custody of the premises of the mission" to a third state.

One objection might be raised to the interpretation differentiating between mission and premises, based upon the final text of Article 12. The original draft required the sending state to obtain the permission of the receiving state before establishing "offices in towns other than those in which the mission itself is established." The final text required permission to establish "offices forming part of the mission in localities other than those in which the mission itself is established." At first blush this article appears to be an isolated reference to physical structures as comprising a "mission," despite the many clear statements to the contrary elsewhere in the Convention and the commentary.

Here again, the rapporteur's commentary clarifies the intent of the article which was "included to forestall the awkward situation which would result for the receiving Government if *mission premises* were established in towns other than that which is the seat of the Government." Report at 92 (emphasis added). The original draft of this article clearly adopted the consistently accepted view that a "mission" is composed of people, and premises are where missions are housed.

The change in language between the draft and the final text was not intended to alter the purpose set forth by the rapporteur. The records of the Vienna Conference demonstrate that the additional words were inserted to make it clear that such offices were to be physically inviolable to the same extent as the mission's primary premises. However, this does not confer diplomatic immunity on those who work there.

In addition, the delegates rejected the use of the all-inclusive term "premises" in this section in order to make it clear that no consent was required for the establishment, for example, of summer residences or homes outside the boundaries of the capital.[4]

In its report to the Secretary of State, the United States delegation to the Vienna Conference observed that Article 12 reflected "[p]resent international practice."[5] The United States declared in 1939 that "the only foreign diplomatic officers . . . permitted to reside and maintain offices in New York City will be the ranking commercial or financial officer,"[6] and it has continuously followed that policy.

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4 *See Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities, Vienna,* 2 March-14 April 1961 (Geneva 1962) 108-12 (remarks of the delegates of the United Kingdom and Turkey; remarks of the delegate of Cuba, observing that a diplomatic mission might establish offices *not* forming part of the mission).

The records of the International Law Commission's consideration and adoption of the draft article and commentary reflect similar concerns. *Summary Records, supra* note 2, at 113-14, 239-40.

5 *United States Delegation to the United Nations Conference on Diplomatic Intercourse and Immunities, Report to the Secretary of State,* Dep't of State Pub. No. 7289 (1962). A position paper of the United States delegation to the Vienna Conference noted the American policy of declining to accredit subordinate trade office employees not resident in Washington, and did not indicate that the Convention would alter that practice. 7 Whiteman, *Digest of International Law* 9 (1970).

6 *Letter from George T. Summerlin, Chief of Protocol of the State Department, to the Belgian Ambassador to the United States* (November 4, 1939).

Finally, the Senate subcommittee considering the Convention was informed by the State Department that the Convention would apply to the "diplomats in Washington, and those in New York at the United Nations and also those attached to the OAS and to the NATO headquarters who have diplomatic status [all of whom] number about 3,000 in this country, roughly,"[7] The subcommittee was further informed that the Convention would not apply to trade office personnel.[8]

B. *The location of one's office in mission premises does not necessarily carry with it diplomatic status.*

Kostadinov argues that he is a "member of the staff of the mission" under the Convention, for he works in the New York trade office, which is housed in mission premises. Since mission premises and the mission itself are independent concepts, however, it does not follow that his working in mission premises requires the conclusion that Kostadinov is a member of the mission.

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7 *Vienna Convention on Diplomatic Relations: Hearing Before the Subcommittee of the Senate Committee on Foreign Relations,* 89th Cong., 1st Sess. 22 (1965) (statement of Leonard C. Meeker, State Department Chief Legal Adviser). At the same time the subcommittee was informed that the text of Article 11, permitting a receiving state to limit the size and categories of staff in sending states' missions, would not change current United States practice. *Id.* at table (list of Convention provisions and their effects, if any, on United States law).

8 *Id.* at 74. With this understanding, in his report to the Senate recommending approval of the Convention, Senator Church wrote:

> "Since there are a great many more foreign official representatives in the United States than those attached to permanent diplomatic missions accredited to the Government of the United States, the committee received assurances that the Vienna convention applied only to the latter group. Members of trade missions and other negotiating groups . . . are not within the scope of this convention. It is strictly limited to the permanent diplomatic missions maintained by foreign governments at the seat of other foreign governments."

Ex. Rep. No. 6, 89th Cong., 1st Sess. 10 (1965).

The members of the Commission and the delegates to the Vienna Conference recognized that under existing international law persons sent by a foreign nation to perform consular duties may maintain offices upon mission premises, but not be members of the mission itself.[9] The delegates demonstrated their clear aversion to conferring diplomatic status upon purely consular officials even when those officials maintained offices on mission premises. The delegates from Brazil, for example, observed that consular sections on mission premises operated as consulates, not as parts of the missions, and that consular personnel often remain behind when their nation's diplomatic missions are recalled. *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities, Vienna*, 2 March-14 April 1961 (Geneva 1962) 82 (*Conference*). In a statement echoed by several other nations' delegates, the Yugoslavian delegate added that while most countries would tolerate the performance of some consular functions on the premises of diplomatic missions, the entire subject of consular relations was outside the scope of that conference on diplomatic immunities. *Conference* at 82-83 (*e.g.*, remarks of delegates of Viet-Nam and Argentina). Ultimately, a separate convention was prepared to regulate consular relations, the Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

The Commision specifically discussed another instance inwhich a person employed and working on mission

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9 *See also Restatement of the Foreign Relations Law of the United States* Title B (tent. Draft No. 4, 1983), intro. note at 23n (observing that foreign officials may be sent abroad for various purposes, "and may have offices at a diplomatic mission . . . but the status of such persons, and their privileges and immunities, must be determined in each case in the light of the agreement between the two states, and is not determined by their title or designation.").

premises nonetheless would not be entitled to be considered a "member of the staff of the mission," and, of course, would not enjoy diplomatic privileges and immunities. Article 9 provides that a receiving state may declare "at any time" that any member of the staff of a mission is not acceptable, in which case the sending state shall "recall the person concerned or terminate his functions with the mission." Should the sending state refuse or fail within a reasonable period to do so, "the receiving State may refuse to recognize the person concerned as a member of the mission."

In the commentary to the draft of this article, the rapporteur observed that should the sending state fail to fulfill its obligations concerning an unacceptable member, the receiving state "may take action of its own accord. It may declare that the functions of the person concerned are terminated, that he is no longer recognized as a member of the mission, and that he has ceased to enjoy diplomatic privileges." *Report* at 91. The delegates at Vienna shared this understanding of the article. *See, e.g., Conference* at 102 (remarks of the delegates of India, Iraq and the U.S.S.R.).[10] Thus, if the sending state refuses to act on the receiving state's objections within a reasonable time, the person concerned loses any diplomatic privileges and immunities which he may once have had, and this is so regardless of whether he continues to be employed by the mission and is provided office space on its premises. Nothing in the convention requires that the receiving state must either expel the person concerned or accept him as a member of the mission.

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10 *See, e.g.*, the 1958 *Summary Records, supra* note 3, at 237-38; and the 1957 Commission proceedings, *Summary Records of the International Law Commission*, [1957] 1 Y.B. Int'l L. Comm'n 201-02, 225.

The mere fact that Kostadinov's office is located in a building in New York which is considered part of the Bulgarian Embassy does not, without more, establish that he is one of the persons who comprise the Bulgarian mission to the United States. Accordingly, we now examine whether pursuant to the terms of the Convention, Kostadinov in particular enjoys diplomatic immunity.

C. *Is Kostadinov a member of the mission?*

During the course of the discussions in Vienna, the Indonesian delegate remarked that it was not the Conference's intent to afford diplomatic status to all persons holding diplomatic passports in cases where the receiving state did not approve. *Conference* at 56. The State Department has consistently refused to recognize "assistant commercial counselors" as having diplomatic immunity and has so notified Bulgaria.

The United States recognizes that New York City is the proper place for offices engaged in expanding trade between foreign countries and the United States. Diplomatic missions to the United States are confined to Washington, D.C. The only exception to the requirement that members of the diplomatic mission reside and work in Washington is that the commercial counselor may also head up the New York trade office and reside in New York. Of course, the counselor may employ other persons from his country to assist in conducting the work of the office, but it does not follow that such persons are members of the diplomatic mission.

In the negotiations between Bulgaria and the United States in 1963 regarding settlement of financial claims, the subject of improving trade between the countries was discussed. The settlement of the claims was contained in a

written agreement. Bulgaria requested insertion of language in the agreement regarding trade between the countries, but the United States insisted on keeping the issues separate. The subject of trade relationships was merely contained in a press release issued by the United States which stated:

> "The United States is prepared to authorize the Legation of the People's Republic of Bulgaria to establish in New York a commercial office which would have the purpose of promoting trade between our two countries. Both Governments will be prepared to facilitate the travel of commercial representatives and officials interested in increasing trade."[11]

Shortly after the issuance of this press release, the director of the State Department's Office for East European Affairs informed the Bulgarian Minister in Washington that only the Bulgarian Commercial Counselor in Washington, who would also head the New York office, would be entitled to diplomatic immunity. He further stated that immunity would not be provided for anyone else employed at the New York trade office. This message was repeated on March 11, 1964, to the First Secretary of the Bulgarian Legation in Washington.[12]

This policy takes on added meaning in this case when we consider the discussions with regard to commercial representation by the Commission. It is perfectly clear that commercial representation is not covered by the Convention.[13] Kostadinov asserts that the press release

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11 Department of State, *For the Press*, No. 355 (July 2, 1963).

12 Department of State, Memorandum of Conversation among Messrs. Vedeler, White and Molerov, March 11, 1964.

13 *See supra* note 3.

constitutes a "Bi-Lateral Agreement" which makes him a commercial attache with diplomatic immunity. Certainly a press release is not a bi-lateral agreement.

The State Department again reminded Bulgaria of its policy regarding New York trade missions on April 25, 1973, in denying the request by the Bulgarian Embassy in Washington for diplomatic license plates for newly arrived trade representatives in New York.[14]

Thrice in the next five years, in 1974,[15] 1977[16] and 1978,[17] the State Department sent circular notes to the chief diplomatic officer of each Washington embassy restating the longstanding United States policy that all mission personnel entitled to diplomatic privileges and immunities, with the exception of the senior financial, economic and commercial officers in New York, must reside in the Washington area.

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14 The letter read as follows:

> "As you know, it is the policy of the Department of State to accept for inclusion in the Department's 'Diplomatic List' only the officer-in-charge of an Embassy Commercial or Financial Office in New York. It is the general practice under such circumstances, since only that officer enjoys privileges and immunities, to issue only three sets of DPL license plates; one for the official vehicle, one for the automobile of the diplomatic officer and one for that of his wife.
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> In view of the foregoing, I regret that it will not be possible to authorize the issuance of DPL license plates for automobiles of other personnel of the office of the Commercial Office of the Bulgarian Embassy in New York."

Letter from State Department Assistant Chief of Protocol to Second Secretary of Bulgarian Embassy, April 25, 1973.

15 *Reprinted in* Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law 1974* at 157-58.

16 *Reprinted in* Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law 1978* at 536-37.

17 *Id.* at 532-36.

In May, 1979 Bulgaria notified the United States that it was sending Kostadinov "in the commercial service of the Embassy of the Peoples' Republic of Bulgaria in Washington" to replace Stefan Kossev. Kossev was an assistant commercial counselor in New York City. At that time Bulgaria knew that Kostadinov would not be accepted by the United States as a member of the mission. Although the United States did not formally notify Bulgaria that Kostadinov was "not acceptable," the whole course of conduct prior to his arrival and thereafter made it abundantly clear that the United States did not consider any person sent by any country with such assignment acceptable as a member of a mission.

This government issued an A-2 visa to Kostadinov. Such a visa does not necessarily confer diplomatic immunity. *See* 8 U.S.C. § 1101(a)(15)(A)(i), (ii) (1982); 22 C.F.R. § 41.12 (1983). This exchange of documents did not constitute a withdrawal by the United States of its understood policy regarding officers of a trade mission in New York. They did not constitute an acceptance of Kostadinov as a member of the Bulgarian diplomatic mission entitled to immunity.

Subsequent to his arrival, Kostadinov never received a diplomatic identity card and his name never appeared on the blue or white lists prepared by this government which indicate that a person has diplomatic immunity. He worked in the trade office in New York City.

In January 1981 the State Department restated its position to the Bulgarian Embassy in connection with Mirolyub Vulov, who had been assigned to the Bulgarian trade office in New York.[18] In April 1981, in another context, the Bulgarian Commercial Counselor was again

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[18] *See Cable from State Department to United States Embassy in Sofia,* January 31, 1981.

advised of the position of the United States.[19] On May 29, 1981, an official of the Bulgarian Ministry of Foreign Affairs met with representatives of the United States Embassy in Sofia and specifically referred to the fact that the United States did not accord its subordinate New York trade officers diplomatic privileges and immunities.[20]

As noted above, in the absence of a specific agreement as to the size of the mission, Article 11 permits the receiving state to "require that the size of a mission be kept within limits considered by it to be reasonable and normal" with regard to conditions in the receiving state and the needs of the mission concerned.[21] That article also

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19 The Bulgarians were told that:

> "Bulgarian officials assigned to the United States Receive A visas, but that the visa itself did not confer diplomatic status or immunity. As a matter of policy, diplomatic missions were required to be located in the District of Columbia . . . to prevent a proliferation of offices and persons with diplomatic status around the country. [The State Department officer] said a number of countries, including Bulgaria, had been permitted to have one officer from the Embassy with diplomatic status resident in New York on an exceptional basis because of that city's commercial significance. None of the other personnel assigned to New York by Bulgaria or by other countries with similar offices were accredited as diplomatic staff or accorded privileges and immunities under the Vienna Convention. [The officer] said they fell in the category of 'miscellaneous foreign government officials' who were entitled only to relief from paying U.S. federal income taxes."

Cable from State Department to United States Embassy in Sofia, April 15, 1981.

20 *See Cable from United States Embassy in Sofia to State Department,* May 29, 1981.

21 The Commission's draft had set up an objective standard of "reasonable and normal" for a mission's size. The delegates at Vienna rejected that standard, and granted the receiving state the right to limit the size of missions to the number *it* considered reasonable and normal. *Conference* 106-08 (committee records), 13-4 (plenary session adopting the article). *See* Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities,* 56 Am. J. Int'l L. 88, 98-99 (1962).

permits the receiving state, on a nondiscriminatory basis, to "refuse to accept officials of a particular category."

The United States did precisely what Article 11 permits. It limited the size of the Bulgarian mission by refusing to accept as members of that mission officials of a certain category, namely, assistant commerical counselors based in New York. Furthermore, it did so on a nondiscriminatory basis.

III. *Conclusion*

This court concludes that Kostadinov is not a member of the Bulgarian mission entitled to immunity from criminal prosecution. The order dismissing the indictment is reversed and the indictment reinstated.

An appeal was subsequently filed by the government from an order of Judge Broderick granting Kostadinov habeas corpus relief. That order was stayed pending appeal and the appeal was consolidated with the appeal on the merits. However, the matter was never briefed nor argued on the appeal from the dismissal of the indictment. This second appeal is dismissed as moot.

CORRECTED TRANSCRIPT

Appendix B—Opinion and Order of U.S. District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

(S) 83 Cr. 616 (VLB)

UNITED STATES OF AMERICA

v.

PENYU BAYCHEV KOSTADINOV,

Defendant.

January 17, 1984
11:00 a.m.

Before:

HON. VINCENT L. BRODERICK,
District Judge

APPEARANCES

RUDOLPH W. GIULIANI,
United States Attorney for the Southern District of New York,

RUTH GLUSHIEN WEDGWOOD,
Assistant United States Attorney

RICHARD SCRUGGS,
Criminal Division, Department of Justice

JOHN MAGE,
ELLEN P. CHAPNICK,
Attorneys for defendant

The Clerk: United States versus Penyu Kostadinov.

The Court: This is the defendant Mr. Kostadinov's motion to dismiss the complaint on the basis of 22 U.S.C. 254(d), which provides as follows:

"Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations under Section 254(b) or 254(c) of this title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual or as otherwise permitted by law or applicable rules of procedure."

In considering this motion, I will be dealing with the nature and the status of the Office of the Commercial Counselor of Bulgaria in New York and the status of Mr. Kostadinov as assistant commercial counselor in that office. It is necessary to consider historically the circumstances under which that office was established to determine its nature and status.

Briefly stated, Mr. Kostadinov's claim is that the Office of the Commercial Counselor in New York is part of the Bulgarian Embassy; that he, Mr. Kostadinov, was a member of the technical and administrative staff of that office and a member of the Bulgarian Mission who has been sent by Bulgaria and accepted by the United States. Hence, he claims that he is immune from prosecution.

The government's position is primarily that the office is not a part of the Bulgarian Embassy or Mission and that it is United States policy that no one working in a trade office in New York of a foreign country has diplomatic immunity except for the senior commercial or financial officer.

The government concedes that the office itself is inviolable under the provisions of the Vienna Convention since the commercial counselor or the senior financial officer, in this case the commercial counselor, has diplomatic

immunity, but it claims that Mr. Kostadinov, as assistant commercial counselor, did not have immunity.

Alternatively, the government argues that if I do find that the commercial office in New York is a part of the Bulgarian Embassy, that it is an office of one; that the commercial counselor is that one and that everyone else working there is simply an employee of Bulgaria and is not entitled to any privileges and immunities.

I note preliminarily that the governing law with respect to immunity is the Vienna Convention on Diplomatic Relations of April 18, 1961. This was ratified by the United States and it entered into force with respect to the United States on December 13, 1972. It has also been ratified by Bulgaria and is in force with respect to Bulgaria.

Prior to the enactment and the ratification and the effectiveness with respect to the United States of the Vienna Convention, the suggestion by the government, the State Department, that Mr. Kostadinov does not have immunity might have been sufficient to conclude the court. Today that treaty is involved and the court cannot be so concluded. The determination of the existence or not of diplomatic immunity with respect to Mr. Kostadinov is a matter of treaty interpretation and application of that interpretation to the facts that have been developed in this case. The Vienna Convention, in short, is a treaty which is the law of the land.

I do note that in 1978 the provisions of Title 22 pertaining to immunity that had been in effect since the early days of the republic were repealed and new provisions embodied in Sections 254(a), (b), (c) and (d) were enacted. Those provisions pertain to the applicability of the Vienna Convention.

I will focus first on the circumstances under which the Commercial Office of Bulgaria in New York was opened. Diplomatic relations between the United States and Bulgaria, which had been broken off for some time, were resumed in 1959 and there were negotiations between the

two countries in the years 1961 through 1963 with respect to various claims of United States nationals and other financial matters.

The documentation which has been made available to me indicates that in the course of those negotiations, Bulgaria was very interested in achieving most favored nation status vis-a-vis the United States and that it was also interested in opening a trade office in New York. The negotiations culminated in an agreement and the execution of various documents related to that agreeemnt on July 2, 1963.

I am very sure that the documentation that has been provided is by no means complete. Many years have passed since 1963 and we have had the experience in the course of this case to learn that the documentation has been hard to come by. I do intend to review this documentation that has been made available, however, including the documention in the course of negotiations which led up to the agreements of July 2, 1963, because in my judgment those negotiations provide a necessary framework.

On February 9, 1963, the minister of the United States in Bulgaria reported to the Department of State concerning a conversation which she had with the Prime Minister of Bulgaria and the Foreign Minister.

I should state that the United States had a legation in Sofia and the Bulgarian government had a legation in Washington during the period 1959-1963. It was some years later, in 1966, that each of those missions was raised to the status of embassy.

The report from Minister Anderson to the Department of State covered various matters, including the question of the financial claims of United States nationals. She stated that she asked the prime minister with respect to those claims whether Bulgaria was ready to put forward a new proposal. The Prime Minister replied that he was not informed on all the details, but as far as he knew, an agreement had almost been reached between the two

governments. He mentioned that there was an amount that was doubled by the United States before the agreement was to be concluded and asked whether in light of this there was any guarantee that if an agreement was reached, the United States would not again increase the amount of its claims. Minister Anderson replied to them that if an agreement were reached which was approved by the State Department, the agreement would be implemented and carried out by the United States Government.

There was further discussion with respect to the claims and other matters and then the prime minister said that in his view all of the questions could be solved very easily, but that the real question is "What will follow the settlement of these problems"

Minister Anderson reported that she replied that she "had several conversations in Washington with, among others, President Kennedy, the Secretary of State and other officials in the Department of State and that we envisage several practical steps which could be taken after the settlement of the outstanding problems, such as:

"A. The establishment of a Bulgarian Trade Office in New York.

"B. Raising the status of our missions to embassies here and in Washington.

"C. A cultural exchange program."

On April 27, 1963 a telegram was sent from the State Department to the American legation in Sofia. The telegram discussed various details with respect to the proposed agreements and procedures for exchanging details of agreements. It stated "Copies Rumanian agreement, exchanges of notes and pertinent legislation air pouched April 25.

"Copy of release on trade with Rumania including indication of U.S. agreement to opening of Rumanian trade office in New York also being pouched. While not an integral part of the Rumanian agreement, this constituted an associated feature of the general settlement. As Bul-

garians know, we would be prepared to issue a corresponding statement for Bulgaria."

On May 16, 1963, there was a memorandum prepared of a conversation as the State Department with respect to a courtesy call by the Bulgarian Minister. According to the memorandum, the Bulgarian Minister asked whether the United States was going to send a delegation to Sofia to negotiate a written financial claims agreement.

Mr. Andrews, who is indicated as being EE, which indicates, I believe, Eastern Europe, stated that work was not finished on a draft claims agreement and that they were not yet ready to send a delegation. The memorandum goes on to say that the minister asked about the prospects for Bulgaria to obtain most favored nation treatment for its exports to the United States and states that Mr. Tyler, the assistant secretary for Europe, said that there would not be much prospect of that, adding that "the volume of trade between the United States and Bulgaria was very small and that we would like to see it increase."

"Mr. Davis remarked that it was our hope, after the conclusion of a claims settlement which would open the way for Bulgaria to establish a trade office in New York and after issuance of a statement expressing our desire to facilitate increased trade, that some expansion of trade could take place even without MFN status for Bulgaria. It would be false to hold out a promise of any change with regard to MFN in the near future."

There was further discussion with respect to trade and tariffs: "The minister wondered how trade could be developed under these circumstances. Mr. Davis said that although he was not familiar with Bulgarian goods or their marketability in the U.S., we favored an increase in trade within the existing legal structure. Bulgarian trade experts would have to explore the U.S. market and conclude sales contracts. The establishment of a trade office in New York and the issuance of a trade statement would

have the effect of improving the atmosphere which some expansion of trade could be achieved."

There is then a memorandum of a conference dated June 1, 1963 at the White House between the President and others and Minister Popov from Bulgaria. In the course of this conference, according to the memorandum, "The minister said they were encouraged by the recent agreement in principle to complete a financial claims settlement and hoped that with the establishment of a trade office in New York some progress could be made in developing U.S.-Bulgarian trade."

Then there is a memorandum to the Secretary of State dated June 14, 1963 reqesting authorization to sign with Bulgaria an intergovernment agreement for the settlement of claims of American nationals against Bulgaria. The memorandum discusses the prior history of the problems with Bulgaria and of the negotiations for the settlement of the claims, discusses the substance of a proposed draft agreement for settlement of property and war damage claims, discusses accompanying notes which it is proposed be exchanged with the Bulgarian government, including a note with respect to the resumption of delivery of U.S. treasury checks to individuals in Bulgaria and a note relating to Bulgaria's obligation to pay outstanding U.S. dollar bonded indebtedneess.

It goes on to discuss a draft statement with respect to trade: "Attached to this memorandum is a draft statement expressing our favorable attitude toward the development of peaceful trade with Bulgaria. While this statement is not to be an integral part of the agreement, it has served as one of the bargaining levers used in the negotiations. We propose to issue this statement in the form of a press release. This has been cleared by the Department of Commerce.

"Recommendation: It is recommended that you authorize Minister Eugenie M. Anderson to sign the proposed agreement and accompanying notes either in their present

form or, if the Bulgarian government will not agree to our precise formulations, an agreement and notes which are similar in all respects. If there is any question of material departure from these texts, it will be referred for consideration by EUR and L without referral to you."

It is my understanding that EUR stands for the Assistant Secretary of State for Europe and L stands for legal counsel.

This memorandum was approved on June 16 by U. Alexis Johnson, who I believe was the Under Secretary of State.

On June 19 a telegram was sent by Stefan, who I believe was a member of the negotiating team then in Bulgaria, to the Secrtary of State. It stated that agreement had been reached on all articles in the United States draft text except two and that the Bulgarian delegation had requested the deletion of certain words. It went on to say that "Bulgarians agreed to eliminate words 'to improve also their economic relations' from preamble on basis that trade statement would be made."

On June 20 a telegram went from Stefan in Sofia to the Secretary of State which stated that agreement had been reached on the claims agreement proper and went on to say that, "USDEL presented draft statement on trade. BULDEL expressed desire for inclusion of MFN reference although reacting otherwise favorably to certain extent."

The telegram concluded with the recommendation that: "If they accept our draft note on Circular 655 and our trade statement, we accept their last proposal for bond notes. Appreciate advice re any objection before meeting June 24."

The telegram from the State Department to the delegation in Sofia on June 21 referred to the trade statement in the following way: "Assume from ref tel you intended adhere our language trade statement and Circular 655 letter. We consider Bulgarian language 2 ref tel unacceptable."

A telegram from Stefan to the State Department on June 27 stated that the claims negotiation had been concluded and an agreement reached on all remaining issues in a June 26 meeting. "Bulgarians accepted: (1) our revised language for paragraph 2, sentence 2 of trade statement," namely: 'the resumption of diplomatic relations facilitated the conduct of trade between the two countries;' (2), our drafts for notes on final value of assets and; (3), bond notes with key fourth paragraph taken from U.S.-Rumanian exchange."

The telegram went on to say that: "The two delegations tentatively agreed on July 2 for signing agreement, for the U.S. press release and July 3 for Bulgarian press release."

On July 2 there was a telegram from Minister Anderson to the Secretary of State stating that she had signed the claims agreement and accompanying documents at the Bulgarian Foreign Ministry and that Deputy Foreign Minister Popov had signed the agreement and documents for the Bulgarian government. The telegram went on to say: "Bulgarian television and press covered ceremony. Minister Popov mentioned to me his satisfaction over U.S. press release."

On July 2 a message went from the American legation in Bulgaria to the Minister of Foreign Affairs, which read as follows: "The Legation of the United States of America presents its compliments to the Ministry of Foreign Affairs of the Peoples Republic of Bulgaria and has the honor to refer to the Agreeemnt signed today between the Governments of the United States of America and the People's Republic of Bulgaria relating to financial questions and to enclose a statement concerning trade relations between the United States of America and the Peoples Republic of Bulgaria, which the Government of the United States of America is issuing today in the United States."

The statement itself reads as follows: "The conclusion of an agreement on financial claims and related issues between the United States of America and the Peoples

Republic of Bulgaria removes a significant obstacle to the establishment of more normal relations between the two countries. Conditions for the expansion of peaceful trade have therefore been improved by the signing of this agreement.

"In 1959, after a nine-year hiatus, the United States and Bulgaria agreed to resume diplomatic relations. The resumption of diplomatic relations facilitated the conduct of trade between the two countries. It is the view of both Governments that the expansion of peaceful trade would be mutually beneficial and would serve to develop increasing ties between the people of the United States and the Bulgarian people. The United States of America is prepared to authorize the Legation of the Peoples Republic of Bulgaria to establish in New York a commercial office which would have the purpose of promoting trade between our two countries. Both Governments will be prepared to facilitate the travel of commercial representatives and officials interested in increasing trade. As conditions permit, both Governments will consider further measures which will contribute to the development of expanded trade relations.

"Through such efforts, the Governments of the United States of America and the Peoples Republic of Bulgaria welcome the possibility of creating favorable conditions for the expansion of peaceful trade and the development of more normal trade relations should also serve as a means of increasing fruitful contacts between the peoples of the two countries."

On July 5, Minister Anderson sent to the Department of State an Airgram with the subject, "Claims Negotiations with Bulgaria." The text stated that there was transmitted therewith: "the following documents regarding the claims Agreement signed with Bulgaria on July 2, 1963." I am summarizing these documents. One, an original copy of the claims agreement; two, conformed copies of notes to the Bulgarian government concerning

Bulgarian dollar obligations, Treasury Circular 655 and assets; three, original notes with respect to Bulgarian dollar bond obligations, Treasury Circular 655 and assets; four, conformed copy of the Legation note to the Ministry of Foreign Affairs of the People's Republic of Bulgaria with respect to the U.S. press release on U.S.-Bulgarian trade relations.

An internal State Department publication reporting on the U.S.-Bulgaria claims agreement included the following on the matter of trade: "Statement on Development of Trade. While not an integral part of the agreement, we released on the same day, a statement expressing our favorable attitude toward the development of peaceful trade with Bulgaria. This statement, which served as one of our bargaining levers during the negotiations, notes that the conclusion of the agreement on financial claims removes a significant obstacle to the establishment of more normal relations between the two countries and that conditions for the expansion of peaceful trade have therefore been improved. We announced that we are prepared to authorize the Bulgarian Legation to establish in New York a commercial office which would have the purpose of promoting trade between the two countries. As conditions permit, both governments will consider further measures which will contribute to the development of expanded trade relations."

At that stage, following the completion of the negotiations in Bulgaria with respect to the claims agreement, the Bulgarian Legation was authorized to open a trade office in New York when it wanted to do so.

There were further conversations with respect to this, both in Washington and in Bulgaria. Thus, on October 23, 1963, Minister Anderson had a conference with the Minister of Foreign Trade of Bulgaria. At that conference she asked whether Bulgaria was now ready to open the trade office in New York and said that she thought it would be helpful to discuss and possibly negotiate the

questions. Minister Budinov said that so far as the New York office was concerned the problem was solved; that he had met in New York with Bulgaria's trade representative who had already found an appropriate office.

I find that the entire context of the negotiations and the relationship of the discussion of the trade office in the context of the claims settlement agreement indicates that the agreement on the part of the United States to permit the Bulgarian Legation to open a trade office in New York was an essential part of the total agreement and that it constituted a binding agreement under international law, and that Bulgaria was, therefore, expressly authorized by the United States to have its Legation open a commercial office in New York.

It has been and it continues to be the position of the government that that trade office when it was opened was not part of the Bulgarian Legation, later the Bulgarian Embassy.

In the course of this motion, an affidavit has been submitted by Richard Gookin, the Associate Chief of Protocol of the Department of State, who has stated, based on his discussions with Department of State personnel and on a review of the official files of the Department of State, "The Office of the Commercial Counselor of the People's Republic of Bulgaria, located at 121 East 62nd Street, New York, New York has never been granted status by the Department of State as part of the Embassy of the People's Republic of Bulgaria, nor is it considered by the Department of State to be part of the Embassy."

The development of documentation in the course of this motion suggests strongly that a great deal of the documentation was not available to Mr. Gookin when he made that affidavit.

I find, for reasons which I will spell out, that the Commercial Counselor's office was established as part of the Bulgarian Legation and that it has continued to the present time to be a part of the Bulgarian Embassy.

I refer first to the authorization reported at the time of the claims settlement agreement. It was reported then that the United States is prepared to authorize the Legation of the People's Republic of Bulgaria to establish in New York a commercial office. The name has been used in correspondence with and by the State Department; thus in a letter dated April 25, 1973 from the Office of Protocol to the Bulgarian Embassy, there is a clear inference that the State Department considered the New York office to be a part of the Embassy:

"As you know, it is the policy of the Department of State to accept for inclusion in the Department's 'diplomatic list' only the officer-in-charge of an Embassy, Commercial or Financial Office in New York. . . . In view of the foregoing, I regret that it will not be possible to authorize the issuance of DPL license plates for automobiles of other personnel of the Commercial Office of the Commercial Office of the Bulgarian Embassy in New York."

There is a State Department memorandum dated March 27, 1968 which gives an indication of how the New York office, not only of the Bulgarian Embassy but of other embassies, was perceived by the State Department. The memorandum is entitled: "Conditions under which East European Embassies are Permitted to Maintain Commercial Offices in New York City."

The memorandum notes the State Department policy that employees of commercial offices do not have immunity. It states, however, that: "The premises of the commercial office, being considered a part of the Embassy, are inviolable."

The memorandum also suggests that "persons applying for visas outside the United States to enter the United States for assignment to the commercial office of an Embassy should indicate that they will be staff members of the Embassy assigned to the commercial office."

The memorandum provides: "The commercial office may not be utilized as a general diplomatic or consular facility,

but only for purposes consonant with the status of the office as part of the Embassy and with the status of the officer-in-charge as reflected in his diplomatic title."

Now, the government has made two arguments with respect to this memorandum. The first argument is that it was never communicated to the Bulgarian Embassy, and apparently it never was communicated to the Bulgarian Embassy. The second argument is that this was a proposed modus operandi that was sent around for comments and that it is not a binding document.

The government also suggested that there are various people out there who might be able to give information to the court if the court was interested in having the information. These are people to whom this memorandum was directed who apparently did not comment, at least to the extent that the comment is a matter of written record.

There are other indications, however, in the files of the State Department itself that this memorandum had substantially more importance than the government suggests. There is a memorandum of March 27, 1973 from apparently the United States Mission at the United Nations to the State Department which refers directly to the 1968 memorandum.

That 1968 memorandum was by its terms from the EUR/EE, which I believe is the Eastern Europe Desk, to S/CPR, which I believe is the Office of Protocol.

"In accord with EUR/EE's memorandum to S/CPR of March 27, 1968, we have authorized the maximum three DPL plates for the use of the Commercial Counselor of Bulgaria in N.Y., one for the use of his wife and one in the name of the office."

That 1968 memorandum dealt, among other things, with license plates and presumably had continued validity and vitality in 1973.

In 1969 Bulgarian officials in the United States protested about certain incidents in New York and Washington against Bulgarian officials. This prompted the Secretary of State to send a telegram on July 14, 1969 to the United

States Embassy in Sofia outlining his response to the incidents. In that telegram he made reference to the diplomatic status of the commercial office, and he added that, "U.S. accepts obligation to provide normal protection to diplomatic missions and their representatives located in this country."

He concluded the telegram: "You can assure Bulgarians that police continuing efforts to apprehend perpetrators of acts against property of Bulgarian government and personnel. New York police will be reminded of diplomatic status of Bulgarian and other East European diplomatic commercial offices located there."

In the Blue List, which is the diplomatic list published by the Department of State, the New York commercial office is listed under the listing for the Bulgarian Embassy.

The record before me indicates that the Bulgarian representatives in this country have maintained consistently that the premises of the New York office are inviolable since the office is, in their contemplation, a part of the Bulgarian Embassy in Washington.

At a meeting on July 1, 1969 with the American Ambassador to Bulgaria in Sofia they discussed this matter, and it is memorialized in a State Department memorandum of conversation:

"Mr. Ivanov recounted in detail the facts as known to the Ministry regarding the breaking and entering of the office of the Bulgarian Trade Mission in New York. He said the Bulgarian Government was most concerned over the gross violation of the inviolability of the Bulgarian Trade Mission office as 'an office of the Bulgarian Embassy.' He said that on June 28 the Commercial Counselor (Ishpekov) found the office turned upside down with a note left by the cleaning woman that she had so found it on June 27 and had called the New York City Police. Ishpekov reported that desks and safes had been broken open and files scattered around. He reported also that upon their arrival (after the cleaning woman's call) the police entered the premises of the Bulgarian Trade Mission with-

out seeking permission from Mr. Ishpekov or other Bulgarian diplomatic representative—this despite the fact that there is a sign outside the office reading 'Embassy of the Peoples Republic of Bulgaria Commercial Office.'"

I should also add to this that when Mr. Kostadinov was originally named by Bulgaria to be Assistant Commercial Counselor, the application was in terms of being an Assistant Commercial Counselor of the Bulgarian Embassy.

In find that both the Department of State and the Republic of Bulgaria have regarded the commercial office in New York, consistently with the understanding that was reached in connection with the claims settlements on July 2, 1963, to be a part of the Embassy of the Republic of Bulgaria.

We will take a five minute recess.

(Recess)

The New York Commercial Office was established at a time when the Vienna Convention was not in effect. I do not have before me the question of Mr. Kostadinov's status as an assistant commercial counselor in the New York office at any time prior to the time that the Vienna Convention came into effect.

It is probable that this court would have been concluded by the suggestion that Mr. Kostadinov had no immunity if that suggestion had been made prior to the time that the Vienna Convention was enacted. There is certainly no question on the record before me but that it has been the consistent position of the Department of State, from 1963 to the present time, that no employees in the commercial office, other than the Commercial Counselor himself, have diplomatic status.

I also note, however, that none of the discussions with respect to diplomatic status took place prior to the time, to wit, July 2, 1963, that the authorization for the opening of that commercial office as a part of the Bulgarian legation was announced.

It will be appropriate at this time, therefore, for me to consider the Vienna Convention, because I shall be later considering the impact of that convention on the facts before me. So I will briefly summarize what I regard as the provisions of the Vienna Convention which are germane to decision in this case.

Article 1 defines "members of the mission" as the "head of the mission and the members of the staff of the mission."

I have used the term define. Perhaps identify is a better word. There is very little in the way of definition.

Article 1(f) provides that: " 'the members of the administrative and technical staff' are the members of the staff of the mission employed in the administrative and technical service of the mission."

Article 1(i) says in substance that the "premises of the mission" are the buildings used for the purpose of the mission.

Article 7 pertains to the appointment of members of the staff of the mission. It states that, "Subject to the provisions of Articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. . . ."

Articles 5 and 8 referred to in Article 7 have no relevance to this case.

Article 9 provides: "1. The receiving State may at any time, and without having to explain its decision, notify the sending State that the head of the mission or any member of of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State."

Article 11, also referred to in Article 7, provides that: "1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the

size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving state and to the needs of the particular mission. 2. The receiving state may equally, within similar bounds and on a nondiscriminatory basis, refuse to accept officials of a particular category."

Article 10 provides in relevant part: "1. The Minister for Foreign Affairs of the receiving state shall be notified of: (a) the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission." It ends: "2. Where possible, prior notification of arrival and final departure shall also be given."

Article 12 provides that: "The sending State may not without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established."

Article 22 provides in relevant part, "The premises of the mission shall be inviolable."

Article 24 makes that applicable to the archives and documents of the mission.

Article 37, paragraph 2, provides, in relevant part, that "Members of the administrative and technical staff of the mission . . . shall enjoy the privileges and immunities specified in Articles 29 to 35," with certain exceptions.

Article 29 provides: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention."

Article 31 provides in relevant part "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State."

Those provisions that the person of a diplomatic agent shall be inviolable in Article 29 and that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state in Article 31 are made applicable to a member of the administrative and technical staff of the mission by reason of Article 37.

Article 32 provides, "1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State. 2. Waiver must always be express."

Article 39 provides in paragraph 1 that: "Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post, or if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed."

Article 47 provides, "1. In the application of the provisions of the present Convention, the receiving state shall not discriminate as between states. 2. However, discrimination shall not be regarded as taking place: (a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State; (b) where by custom or agreement States extend to each other more favorable treatment than is required by the provisions of the present Convention."

The government has argued that even if, as I have found, the New York Commercial Counselor's office is part of the Bulgarian Embassy, it must be viewed as a mission of one. That is, only the head of the office, the chief commercial counselor, may be considered a member of the mission and thus entitled to the privileges and immunities provided in the Vienna Convention. It is the government's position that the United States has the right to restrict the New York office in this fashion, relying principally on Article 11 of the Vienna Convention.

Article 11 provides that: "In the absence of specific agreement as to size, the size of the mission, the receiving State may require that the size of the mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission." It also provides that "The receiving State may equally,

within similar bounds and on a nondiscriminatory basis, refuse to accept officials of a particular category."

The government's position is that it has exercised its prerogative under Article 11 to limit the size of the New York office by, (1) issuing circulars in 1974 and 1977 which require that staff members of a mission reside in Washington, D.C. and, (2) by informing Bulgarian officials in Washington and in Sofia that only the head of the New York office was entitled to diplomatic immunity and that the subordinate staff members were not so entitled.

In 1974 and again in 1977 the State Department sent circular notes to all chiefs of mission in Washington, including that of Bulgaria. The 1977 note restated, among other things, the State Department's 1974 pronouncement that the staff of a diplomatic mission must reside in the Washington, D.C. area.

"In order that the policy of accreditation may be uniformly a matter of record for all missions, the criteria is set forth in detail as follows: Each diplomatic officer must (1) possess a valid diplomatic passport, if diplomatic passports are issued by his government, or, in the alternative, this mission should by diplomatic note explain its absence in particular cases if the government does issue diplomatic passports; (2) possess a recognized diplomatic title; (3) be a holder of an A-1 nonimmigrant visa; (4) with the exception of the designated senior financial economic and commercial positions in New York City, reside in the Washington, D.C. area; and devote official activities to diplomatic duties on an essentially full-time basis."

That note concludes, "The Chiefs of Mission are also reminded that the following criteria apply respecting acceptance of individuals as members of the nondiplomatic staffs entitled to certain privileges, exemptions and immunities. They must (1) possess A-2 or A-3 visas; (2) be performing full-time duties with the diplomatic mission, and (3) reside in the Washington, D.C. area."

The evidence before me indicates that the materials contained in the 1974 note and the 1977 note did not come as

any surprise to either Bulgarian officials or officials of any other embassy. The testimony before me in the course of this hearing indicates very clearly that as early as 1963, the Bulgarian Minister in Washington was notified of these restrictions and there have been apparently consistent restrictions imposed by the State Department since at least that time.

As recently as 1981 there were specific exchanges on this subject between the Department of State and the Bulgarian authorities. A Department of State telegram to the American Embassy in Sofia dated January 31, 1981 discusses the status of the staff of the Bulgarian office in New York. The relevant portion of that telegram reads: "1. In the course of sorting out the documentation of Mirolyub Vutov assigned to the Bulgarian Trade Office in New York, the Department had occasion to review with the Bulgarian Embassy the existing procedures regarding trade office personnel. Those procedures are set out below for the information and guidance of the Embassy."

"2. The head of the trade office will be entitled to diplomatic status and will be assigned formally as Commercial Counselor at the Bulgarian Embassy in Washington. He will be issued an A-1 visa, notified to the department's Office of Protocol, and will receive full diplomatic accreditation and full diplomatic privileges and immunities.

"3. Other personnel assigned to the trade office, who are employees of the Bulgarian Ministry of Foreign Affairs or Ministry of Foreign Trade, will be issued A-2 visas. They will be notified to the Office of Protocol, but will not be accerdited or issued diplomatic identity or tax cards. They will have no diplomatic privileges or immunities."

A meeting in Washington on April 10, 1981 involved conversations with respect to this matter with Bulgarian officials, and those conversations are memorialized in a State Department memorandum: "Shamwell said that Bulgarian officials assigned to the United States receive "A" visas, but that the Visa itself did not confer diplomatic

status or immunity. As a matter of policy, diplomatic missions were required to be located in the District of Columbia, he said, to prevent a proliferation of offices and persons with diplomatic status around the country. Shamwell said a number of countries, including Bulgaria, had been permitted to have one officer from the Embassy with diplomatic status resident in New York on an exceptional basis because of that city's commercial significance. None of the other personnel assigned to New York by Bulgaria or by other countries with similar offices were accredited as diplomatic staff or accorded privileges and immunities under the Vienna Convention. He said they fell in the category of 'miscellaneous foreign government officials' and were entitled only to relief from paying U.S. federal income taxes.

Dragov stated that the Bulgarian officials assigned to New York operated under the direction of the Bulgarian Ambassador. Under the relevant U.S. laws, diplomatic agents were entitled to full immunity and members of the technical and administrative staff were entitled to full criminal immunity as well as civil immunity for acts undertaken in the conduct of their official duties. Shamwell pointed out that these immunities applied only to accredited members of the Embassy staff and that the Bulgarian personnel in New York, other than Toromonov," and I interject here that Toromonov at that time was the Commercial Counselor, "were neither diplomatic agents nor technical and administrative staff or service staff. He said that persons who were accredited received official identity documents from the department and were included in the department's blue or white lists of diplomatic personnel. An on-the-spot examination of copies of those lists verified that Toromonov was the only Bulgarian official in New York so listed. Toromonov acknowledged that the situation was as described by Shamwell, but Dragov said that we would have to discuss the matter with his Ambassador before commenting further."

The record shows that State Department officials had at least four additional meetings from late April through June 1981 with Bulgarian officials on the subject of privleges and immunities, and that the department's policy toward the New York office was expressed at these meetings.

A telegram of June 6, 1981 from the Secretary of State to the United States Embassy in Sofia indicates how firmly entrenched this policy was:

"The explanation of the U.S. position on personnel ceilings provided by chargé (paragraph 4 of REFTEL) was exactly on track. In response to the question raised by Pchelintsev, the embassy should inform the MFA"—the Ministry of Foreign Affairs—"that we do not wish to play numbers games with the staffs of our embassies in Sofia and Washington. We will continue to accredit as members of the Bulgarian Embassy in Washington only those persons resident in Washington and the Embassy Commercial Counselor who is resident in New York. We will take into general account the total number of Bulgarian government officials assigned to the United States and Washington and in other cities in considering the appropriateness of the level of staffing. We do not intend, however, to include nondiplomatic personnel in New York in any listing of persons accredited to the U.S."

The issue that is drawn, therefore, is whether the Department of State, which acts for the President, may withhold privileges and immunities from staff personnel working in the Office of the Commercial Counselor of the Bulgarian Embassy in New York under the Vienna Convention.

Under Article 11 of the Vienna Convention, a receiving state, in this case the United States, has discretion over the size of the mission, over the numbers of persons at the mission. There is nothing in the Vienna Convention, however, that gives the receiving state control over the question of privileges and immunities. The Vienna Convention in this particular departs from history. It makes it very clear that a receiving state may limit size.

It gives no authority to a receiving state to withhold privileges.

It would seem to me in fact, given the structure of the Vienna Convention, that if the receiving state could limit privileges and immunities, logic would go out of the provisions of the Vienna Convention itself. The very structure of the convention is to spell out the consequences of status. If a person is a technical or administrative member of a mission, he is under the Vienna Convention entitled to certain privileges and immunities, and one of those privileges is immunity from criminal prosecution.

The action tatken by the Department of State goes directly to privileges and immunities. Mr. Kostadinov applied for a visa on the basis that he was going to be an assistant commercial counselor of the Bulgarian Embassy, replacing another person who had held that same position of assistant commercial counselor in New York. He was permitted to come into this country. He was notified to the State Department. He was permitted to work in the commercial counselor's office in New York, and I have found already that that office was a part of the Bulgarian Embassy.

This record indicates that the Department of State has made no effort to limit the numbers of persons working in the Office of the Commercial Counselor in New York. I am sure that that does not mean that no such efforts have been made, but certainly there are no such efforts which are part of the record before me, and the Department of State has been notified not only with respect to Mr. Kostadinov, but with respect to everyone else who is working in that office. It has always had the option to declare him not acceptable, and if he were declared not acceptable, Bulgaria would be required under the Vienna Convention to recall or to terminate his functions. The Department of State has not done that and presumably as a matter of practice has never done that in the past because it has relied on what it regarded as its power prior to the application of the Vienna Convention to with-

hold diplomatic privilege. Now after the application of the Vienna Convention it believes it has the same power to withhold diplomatic privilege.

We have here a commercial office, part of the Bulgarian Embassy, which was in place and operating and had a staff as of the time the Vienna Convention became effective. Presumably in that period before the Vienna Convention became effective it was entirely appropriate for the State Department, with respect to the Bulgarian office in New York or any similar office, to withhold diplomatic privileges and immunities. Its authority to do it once the Vienna Convention was adopted must be found in the Vienna Convention or in 22 U.S.C. 254, which is intented effectively to implement the Vienna Convention.

The consistency of the State Department policy with respect to employees of officers of missions, such as the Commercial Counselor's Office of the Bulgarian Embassy, has been established beyond peradventure. It has been a longstanding policy, and so far as everything before me is concerned, it has been applied uniformly. It has been articulated and I have reviewed a great deal of this articulation in circular notes and in conferences with Bulgarian officials.

But that policy, no matter how consistently articulated or how long it had been held, must be evaluated in light of the international commitments which bind the United States. It cannot operate to contradict the language of the Vienna Convention, which is a multilateral treaty to which the United States has pledged its support. That convention sets forth very clearly the privileges and immunities to which a technical or administrative employee of an embassy is entitled.

Having adhered to the Vienna Convention and consented to the provisions of the Vienna Convention, the United States is bound to respect the privileges and immunities which that Convention provides, and those privileges apply in equal force with respect to the Bulgarian Embassy in

Washington and to the Office of the Commercial Counselor in New York, which is a branch of that embassy.

Because of Article 12 of the convention, the United States need never have been concerned about immunity with respect to any foreign trade office in New York. That section provides that, "The sending state may not, without the prior express consent of the receiving state, establish offices forming part of the mission in localities other than those in which the mission itself is established." But the United States did consent to the establishment of the office in New York as a part of the Bulgarian legation, now the Bulgarian Embassy.

Having given that consent, the United States, by signing the Vienna Convention and adhering to it, committed itself to providing the staff of the embassy in the New York office with the privileges that are spelled out in the Convention.

If when the Convention had been signed the United States had wanted a residency requirement for staff members of a mission, it presumably could have either sought the insertion of such a provision in the Convention or it could have taken a reservation or an exception on that matter. So far as any evidence before me is concerned, it did not.

If, therefore, Mr. Kostadinov is functioning as Assistant Commercial Counselor of the Bulgarian Embassy in New York and he has been properly noticed to the United States, he is entitled to the immunities which are set forth in the Vienna Convention. Specifically, under Articles 37 and 31 he is entitled to immunity from criminal jurisdiction.

I now address the question of whether he has properly become a staff member of the Bulgarian Mission. Again I turn to the Vienna Convention.

Article 7 provides that subject to various other provisions, "the sending state may freely appoint the members of the staff of the mission." One of those subject Articles is Article 9, which provides that the receiving state may

notify the sending state that any member of the staff of a mission is not acceptable.

Article 10 requires that a receiving state be notified of the appointment of members of the mission. This duty of notification may very well be a new duty imposed by the Vienna Convention and on such notification the receiving state, here the United States, could declare that the member appointed by the sending state was unacceptable.

Now, the receiving state can act either before or after the staff member has arrived. Article 9 provides that the receiving state may at any time, and without having to explain its decision, notify the sending state that any member of the staff of the mission is not acceptable. So what the Vienna Convention spells out its notification by the sending state and refusal by the receiving state.

Mr. Kostadinov relies on notice to the United States Embassy in Sofia that he was appointed an employee in the commercial service of the Embassy of the Peoples Republic of Bulgaria, that was on May 5, 1979, and a visa was issued on May 23, 1979, and he assumed his duties in New York on July 3, 1979.

Between then and now several visas have been issued with respect to Mr. Kostadinov. On his application for those visas, his position has been described as assistant to the commercial counselor or as assistant commercial counselor in New York City. In a form DA 394, which was filed on behalf of Mr. Kostadinov on November 19, 1980, he was described as assistant commercial counselor of the Bulgarian Embassy's commercial counselor's office and a New York address was given. It is my recollection that there were two succeeding registrations filed on DA 394.

The Vienna Convention does not provide any form of notification or of accreditation and it is certainly abundantly clear from the record before me that the Department of State knew precisely where Mr. Kostadinov would be working and in what capacity.

The United States delegation to the Vienna Convention considered the question of formality or lack of formality with respect to notification procedure:

"All that should be necessary in the case of a member of the staff of the mission is his notification by the sending state to the two receiving states (where there are two receiving states) and their express or tacit acceptance of him. A person can be 'accredited' in many ways. A note from the head of mission regarding a newly arrived member of his staff should be quite sufficient to assure the receiving state that he does in fact speak for his government. Unless the receiving state objects to the appointment, he will thereby have been 'accredited' in the dictionary meaning of the term."

The evidence presented before me shows that Mr. Kostadinov complied with notification requirements, nor did the United States specifically object in the ways prescribed in the convention. It never declared him unacceptable. It never declared him *persona non grata*, although that would not be applicable because apparently that applies only to persons with diplomatic rather than nondiplomatic status. It never expressed any objection to Mr. Kostadinov or to him serving in the position of assistant commercial counselor.

It argues that its policy, set forth in the notes I have already discussed, and the fact that he never appeared on a white list that is published by the State Department was notice to the Bulgarian Embassy, and to Mr. Kostadinov, that he was not accepted as part of the embassy staff.

The problem about that argument is that it was notice of no such thing. It was notice that while Mr. Kostadinov was being accepted and was not being rejected as an employee of the commercial counselor's office, that he would not be accorded diplomatic privileges and immunities. At this stage, the State Department was arrogating to itself on a continuing basis powers that it undoubtedly had prior

to the adherence to the Vienna Convention, but which it has no longer.

Mr. Kostadinov's title of Assistant Commercial Counselor makes him a member of the administrative and technical staff of the Bulgarian Embassy within the meaning of the Vienna Convention and the Diplomatic Relations Act, 22 U.S.C. 254(a), which adopts the descriptions of the Vienna Convention.

Article 1 of the Vienna Convention refines members of the administrative and technical staff as members of the mission.

The Vienna Convention provided only three categories for members of a mission: Diplomatic members, technical and administrative members and service members. The approach of the Department of State is to provide a fourth category not authorized by the Vienna Convention, and not authorized by 22 U.S.C. 254, that is, members of the technical and administrative staff who are not entitled to privileges and immunities.

I find, therefore, that Mr. Kostadinov is a member of the technical and administrative staff of the Bulgarian Embassy in his capacity as assistant commercial counselor.

I find further that the Department of State was properly notified of his designation.

I find further that the Department of State, having been notified and having accepted Mr. Kostadinov in the sense that he was assigned to the New York office after notice to the Department of State and without objection by the Department of State, the Department of State had no authority and no power under the Vienna Convention to deny him the privileges which the Vienna Convention accords him.

I find that he was not rejected by the Department of State. He was therefore accepted by the Department of State.

In arriving at this decision, I have given consideration to the provisions of 22 U.S.C. 254(c). It provides: "The

President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for the members of the mission, their families and the diplomatic couriers which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention."

I note first that Article 47 of the Vienna Convention authorizes more favorable treatment, but not less favorable treatment.

I note further that any action taken under 254(c) by the President must be on the basis of reciprocity. There is no evidence in this case that the attempt to deny privileges and immunities to Mr. Kostadinov was on the basis of reciprocity. Indeed, it was a general policy which was made applicable to all. I find, therefore, that Section 254(c) has no application.

I find that under the Vienna Convention, Mr. Kostadinov is immune from the criminal jurisdiction of the United States and I grant the motion.

Appendix B—Opinion and Order of U.S. District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

83 Crim. 616 (VLB)

UNITED STATES OF AMERICA,

—against—

PENYU BAYCHEV KOSTADINOV, a/k/a "Penyo B. Kostadinov", a/k/a "Penu B. Kostadinov",

Defendant.

ORDER

VINCENT L. BRODERICK, U.S.D.J.

Defendant moved to dismiss the indictment pursuant to 22 U.S.C. §254d and Rule 12, Fed.R.Crim.P.

For reasons set forth on the record, the motion is granted.

This order will not become effective until appeal has been had.

SO ORDERED.

/s/ VINCENT L. BRODERICK,
U.S.D.J.

Dated: New York, New York
January 17, 1984

Copies Mailed to Counsel of Record

APPENDIX C

Vienna Convention on Diplomatic Relations

UNITED NATIONS CONFERENCE ON
DIPLOMATIC INTERCOURSE AND IMMUNITIES

VIENNA CONVENTION
ON
DIPLOMATIC RELATIONS

[UNITED NATIONS SEAL]

United Nations
1961

VIENNA CONVENTION ON DIPLOMATIC RELATIONS

The State Parties to the present Convention,

Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,

Having in mind the purposes and principles of the Charter of the United Nations[1] concerning the sovereign equality of States, the maintenance of international peace and security, the promotion of friendly relations among nations,

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[1] TS 993; 59 Stat. 1031.

Appendix C
Vienna Convention on Diplomatic Relations

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 1

For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) the "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;

(b) the "members of the mission" are the head of the mission and the members of the staff of the mission;

(c) the "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

(d) the "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;

(e) a "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;

(f) the "members of the administrative and technical staff" are the members of the staff of the mission employed in the administrative and technical service of the mission;

(g) the "members of the service staff" are the members of the staff of the mission in the domestic service of the mission;

(h) a "private servant" is a person who is in the domestic service of a members of the mission and who is not an employee of the sending State;

(i) the "premises of the mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

Article 2

The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.

Article 3

1. The functions of a diplomatic mission consist *inter alia* in:

(a) representing the sending State in the receiving State;

(b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;

(c) negotiating with the Government of the receiving State;

(d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

(e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Article 4

1. The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.

2. The receiving State is not obliged to give reasons to the sending State for a refusal of *agrément*.

Article 5

1. The sending State may, after it has given due notification to the receiving State concerned, accredit a head of

mission or assign any member of the diplomatic staff, as the case may be, to more than one State, unless there is express objection by any of the receiving States.

2. If the sending State accredits a head of mission to one or more other States it may establish a diplomatic mission headed by a *chargé d'affaires ad interim* in each State where the head of mission has not his permanent seat.

3. A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organization.

Article 6

Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State.

Article 7

Subject to the provisions of Articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval or air attachés, the receiving State may require their names to be submitted beforehand, for its approval.

Article 8

1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.

2. Members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State, except with the consent of that State which may be withdrawn at any time.

3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Article 9

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.

Article 10

1. The Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of:

(a) the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;

(b) the arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;

(c) the arrival and final departure of private servants in the employ of persons referred to in sub-paragraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;

(d) the engagement and discharge of persons resident in the receiving State as members of the mission or private servants entitled to privileges and immunities.

2. Where possible, prior notification of arrival and final departure shall also be given.

Article 11

1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.

2. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

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Article 12

The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.

Article 13

1. The head of the mission is considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, in accordance with the practice prevailing in the receiving State which shall be applied in a uniform manner.

2. The order of presentation of credentials or of a true copy thereof will be determined by the date and time of the arrival of the head of the mission.

Article 14

1. Heads of mission are divided into three classes, namely:

(a) that of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;

(b) that of envoys, ministers and internuncios accredited to Heads of State;

(c) that of *chargés d'affaires* accredited to Ministers for Foreign Affairs.

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2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

Article 15

The class to which the heads of their missions are to be assigned shall be agreed between States.

Article 16

1. Heads of mission shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with Article 13.

2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence.

3. This article is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.

Article 17

The precedence of the members of the diplomatic staff of the mission shall be notified by the head of the mission to the Ministry for Foreign Affairs or such other ministry as may be agreed.

Article 18

The procedure to be observed in each State for the reception of heads of mission shall be uniform in respect of each class.

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Article 19

1. If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, a *chargé d'affaires ad interim* shall act provisionally as head of the mission. The name of the *chargé d'affaires ad interim* shall be notified, either by the head of the mission or, in case he is unable to do so, by the Ministry for Foreign Affairs of the sending State to the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.

2. In cases where no member of the diplomatic staff of the mission is present in the receiving State, a member of the administrative and technical staff may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the mission.

Article 20

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport.

Article 21

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodations in some other way.

2. It shall also, where necessary, assist missions in obtaining suitable accommodation for their members.

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Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 23

1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or head of the mission.

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

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Article 25

The receiving State shall accord full facilities for the performance of functions of the mission.

Article 26

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Article 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official corrsepondence means all correspondence relating to the mission and its functions.

3. The diplomatic bag shall not be opened or detained.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate diplomatic couriers *ad hoc*. In such cases the provisions of paragraph 5 of this Article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

Article 28

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and

shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from the civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable porperty situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

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2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraph (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

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Article 33

1. Subject to the provisions of paragraph 3 of this Article, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provision which may be in force in the receiving State.

2. The exemption provided for in paragraph 1 of this Article shall also apply to private servants who are in the sole employ of a diplomatic agent, on condition:

(a) that they are not nationals of or permanently resident in the receiving State; and

(b) that they are covered by the social security provisions which may be in force in the sending State or a third State.

3. A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.

5. The provisions of this Article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

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Article 34

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;

(d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

Article 35

The receiving State shall exempt dipomatic agents from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

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Vienna Convention on Diplomatic Relations

Article 36

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

(a) articles for the official use of the mission;

(b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.

2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemption mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

Article 37

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they

are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.

3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.

4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 38

1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and

inviolability, in respect of official acts performed in the exercise of his functions.

2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in cases of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the

expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

Article 40

1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or traveling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to *force majeure*.

Article 41

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

2. All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Minstry of Foreign Affairs of the receiving State or such other ministry as may be agreed.

3. The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agree-

ments in force between the sending and the receiving State.

Article 42

A diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity.

Article 43

The function of a diplomatic agent comes to an end, *inter alia*:

(a) on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;

(b) on notification by the receiving State to the sending State that, in accordance with paragraph 2 of Article 9, it refuses to recognize the diplomatic agent as a member af the mission.

Article 44

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immurities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Appendix C
Vienna Convention on Diplomatic Relations

Article 45

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;

(b) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;

(c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

Article 46

A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals.

Article 47

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision of its mission in the sending State;

(b) where by custom or agreement States extend to each other more favorable treatment than is required by the provisions of the present Convention.

Article 48

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice,[1] and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows: until 31 October 1961 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1962, at the United Nations Headquarters in New York.

Article 49

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 50

The present Convention shall remain open for accession by any State belonging to any of the four categories men-

[1] TS 993; 50 Stat. 1055.

tiond in Article 48. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 51

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 52

The Secretary-General of the United Nations shall inform all States belonging to any of the four categories mentioned in Article 48:

(a) of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with Articles 48, 49 and 50;

(b) of the date on which the present Convention will enter into force, in accordance with Article 51.

Article 53

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are

equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in Article 48.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE AT VIENNA, this eighteenth day of April one thousand nine hundred and sixty-one.

Appendix C
22 U.S.C. §254

§ 254a. DEFINITIONS

As used in sections 254a to 254e of this title—

(1) the term "members of the mission" means—

(A) the head of a mission and members of the diplomatic staff of a mission,

(B) members of the administrative and technical staff of a mission, and

(C) members of the service staff of a mission,

as such terms are defined in Article 1 of the Vienna Convention;

(2) the term "family" means—

(A) the members of the family of a member of a mission described in paragraph (1)(A) who form part of his or her household if they are not nationals of the United States, and

(B) the members of the family of a member of a mission described in paragraph (1)(B) who form part of his or her household if they are not nationals or permanent residents of the United States,

within the meaning of Article 37 of the Vienna Convention;

(3) the term "mission" includes missions within the meaning of the Vienna Convention and any missions representing foreign governments, individually or collectively, which are extended the same privileges and immunities, pursuant to law, as are

enjoyed by missions under the Vienna Convention; and

(4) the term "Vienna Convention" means the Vienna Convention on Diplomatic Relations of April 18, 1961 (T.I.A.S. numbered 7502; 23 U.S.T. 3227), entered into force with respect to the United States on December 13, 1972.

Pub.L. 95-393, § 2, Sept. 30, 1978, 92 Stat. 808.

§ 254d. DISMISSAL ON MOTION OF ACTION AGAINST INDIVIDUAL ENTITLED TO IMMUNITY

Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under section 254b or 254c of this title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure.

Pub.L. 95-393, § 5, Sept. 30, 1978, 92 Stat. 809.

Appendix C

Department of State

AIRGRAM

PS 8-4 US-BUL

A-3 UNCLASSIFIED

Date: July 5, 1963

From: AmLegation SOFIA

Subject: Claims Negotiations with Bulgaria

Transmitted herewith are the following documents regarding the Claims Agreement signed with Bulgaria on July 2, 1963:

1. Original engrossed copy of the U.S.-Bulgaria Claims Agreement;
2. Conformed copies of Notes in English and Bulgarian to the Bulgarian Government regarding:
   a. Bulgarian dollar bond obligations;
   b. Treasury Circular No. 655; and
   c. Assets;
3. Original Notes in English and Bulgarian from the Bulgarian Government with respect to:
   a. Bulgarian dollar bond obligations;
   b. Treasury Circular No. 655; and
   c. Assets;
4. Conformed copy of Legation Note to the Ministry of Foreign Affairs of the People's Republic of Bulgaria, dated July 2, 1963, with respect to the U.S.-Press Release on U.S.-Bulgarian Trade Relations.

EUGENIE ANDERSON
Eugenie Anderson

Unclassified

For Dept. Use Only
In

GWSpangler:fjg 7/5/63

Appendix C

The Legation of the United States of America presents its compliments to the Ministry of Foreign Affairs of the People's Republic of Bulgaria and has the honor to refer to the Agreement signed today between the Goverments of the United States of America and the People's Republic of Bulgaria relating to financial questions and to enclose a statement concerning trade relations between the United States of America and the People's Republic of Bulgaria, which the Government of the United States of America is issuing today in the United States.

The Legation of the United States of America takes this opportunity to renew to the Ministry of Foreign Affairs of the People's Republic of Bulgaria the assurances of its high consideration.

Enclosure:

Statement, as described above.

Legation of the United States of America,
Sofia, July 2, 1963.

Appendix C

STATEMENT ON U.S.-BULGARIAN TRADE RELATIONS

The conclusion of an agreement on financial claims and related issues between the United States of America and the People's Republic of Bulgaria removes a significant obstacle to the establishment of more normal relations between the two countries. Conditions for the expansion of peaceful trade have therefore been improved by the signing of this Agreement.

In 1959 after a nine-year hiatus the United States and Bulgaria agreed to resume diplomatic relations. The resumption of diplomatic relations facilitated the conduct of trade between the two countries. It is the view of both Governments that the expansion of peaceful trade would be mutually beneficial and would serve to develop increasing ties between the people of the United States and the Bulgarian people.

The United States of America is prepared to authorize the Legation of the People's Republic of Bulgaria to establish in New York a commercial office which would have the purpose of promoting trade between our two countries. Both Governments will be prepared to facilitate the travel of commercial representatives and officials interested in increasing trade. As conditions permit, both Governments will consider further measures which will contribute to the development of expanded trade relations.

Through such efforts, the Governments of the United States of America and the People's Republic of Bulgaria welcome the possibility of creating favorable conditions for the expansion of peaceful trade, and the development of more normal trade relations should also serve as a means of increasing peaceful contacts between the peoples of the two countries.

No. 84-35

In the Supreme Court of the United States

OCTOBER TERM, 1984

PENYU BAYCHEV KOSTADINOV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an employee of Bulgaria's New York trade office is entitled to diplomatic immunity from criminal prosecution for attempted espionage and conspiracy to commit espionage.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 734 F.2d 905.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1984. The petition for a writ of certiorari was filed on July 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted on September 30, 1983, for attempted espionage and conspiracy to commit espionage, in violation of 18 U.S.C. 794(a) and (c).[1] On October 6, 1983, petitioner moved to dismiss the indictment

[1] A superseding indictment incorporating minor changes was filed on November 23, 1983. Petitioner had been first charged with these offenses by sworn complaint dated September 24, 1983.

on the ground that he is entitled to diplomatic immunity under the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3229, T.I.A.S. No. 7502, which entered into force in the United States on December 13, 1972, and under the Diplomatic Relations Act, 22 U.S.C. 254a *et seq.* On January 17, 1984, the district court dismissed the indictment, holding that petitioner is entitled to diplomatic immunity under the Convention and its implementing statute (Pet. App. 20a-50a). The court of appeals reversed (Pet. App. 1a-19a).

1. Petitioner, an employee of the Bulgarian Ministry of Foreign Trade, served as an assistant commercial counselor in Bulgaria's New York trade office. With the permission of the United States, the Bulgarian Legation (later Embassy) in Washington, D.C., opened the office in New York in 1963 in order to promote trade between the two countries. The commercial counselor designated by Bulgaria to head that office was specifically granted diplomatic immunity by the United States, but other employees in the office were not. Pet. App. 3a.

As the court of appeals explained, the record reflects that on September 23, 1983, petitioner met in a Manhattan restaurant with an individual from whom he purchased a secret document entitled "Report on Inspection of Nevada Operations Office," which concerned various security procedures for American nuclear weapons. Petitioner paid the individual $300, arranged to meet the person again to make further payment, and gave the person a list of 30 additional classified documents that petitioner wanted to acquire. Unbeknownst to petitioner, the individual with whom he dealt had been providing information to the Federal Bureau of Investigation. FBI agents recorded the meeting on audiotape and videotape and arrested petitioner as he left the meeting. Petitioner subsequently was indicted

on one count of attempted espionage and one count of conspiracy to commit espionage, in violation of 18 U.S.C. 794(a) and (c). Pet. App. 3a-4a.

2. The district court granted petitioner's motion to dismiss the indictment, concluding that because, in its view, the New York trade office in which petitioner worked was part of the premises of the Bulgarian Embassy, his title "assistant commercial counselor" makes him a member of the staff of the "embassy"[2] and entitles him to diplomatic immunity. Pet. App. 4a.

The court of appeals reversed (Pet. App. 1a-19a).[3] After a thorough review of the terms of the Vienna Convention, the court concluded that petitioner was not a member of Bulgaria's diplomatic mission to the United States and therefore was not entitled to diplomatic immunity. In particular, the court concluded that the district court had misapprehended the Vienna Convention's use of the term "mission" by focusing on petitioner's locus of employment in Bulgaria's New York

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[2] The district court used the term "embassy." Following the lead of the court of appeals, we will use the word "mission," which is the term used by the Vienna Convention. Pet. App. 4a n.1.

[3] When he entered his plea of not guilty, petitioner applied for release on bail pending trial. The district court denied the application on October 19, 1983; the court of appeals affirmed the order on October 28, 1983, and Justice Marshall denied petitioner's application for release on November 4, 1983. (No. A-333; A-333 Application Exhs. B, C). When the district court ordered dismissal of the indictment, it again denied petitioner's application for release on bail pending appeal. After the government filed its notice of appeal, petitioner, on January 30, 1984, renewed his application for release. On February 15, 1984, after further briefing and oral argument, the district court determined that the motion should be treated as a petition for a writ of habeas corpus and granted relief. On February 21, 1984, the court of appeals granted a stay of the district court's order dismissing the indictment and of all subsequent orders and ordered an expedited briefing schedule. On March 7, 1984, Justice Blackmun denied petitioner's application for release (No. A-687).

trade office (Pet. App. 7a-8a). The court of appeals explained that, under the Convention, the term "mission" refers to a group of persons sent by one state to another, not to the premises those persons occupy in the receiving state (*ibid.*). Accordingly, the court concluded, the fact that petitioner worked on mission premises in Bulgaria's New York trade office did not in itself mean that he was a member of the "mission" and therefore entitled to diplomatic immunity (Pet. App. 11a-14a).

The court of appeals also concluded that petitioner in fact is not a member of the Bulgarian "mission" for purposes of the immunity conferred by the Vienna Convention. The court explained that Article 7 of the Convention (Pet. App. 55a) allows a sending state to appoint the members of the staff of a mission, subject to restrictions permitted by Articles 9 and 11 (Pet. App. 56a, 57a). Those Articles permit a receiving state to declare not acceptable a person designated to a mission staff, to refuse to accept particular categories of officials, and to limit the size of a mission. Consistent with these provisions, the court explained, the United States "limited the size of the Bulgarian mission by refusing to accept as members of that mission officials of a certain category, namely, assistant commercial counselors based in New York" (Pet. App. 19a; see *id.* at 5a-6a, 11a-19a). The United States instead has confined personnel assigned to diplomatic missions to Washington, D.C. "The only exception to the requirement that members of the diplomatic mission reside and work in Washington is that the commercial counselor may also head up the New York trade office and reside in New York" (Pet. App. 14a).

The court of appeals also found that "[t]he State Department has consistently refused to recognize 'assistant commercial counselors' as having diplomatic immunity and has so notified Bulgaria" (Pet. App. 14a). The

court noted that although the United States had issued a press release in 1963 (at the time of the settlement of financial claims of United States nationals against Bulgaria) announcing that the United States was prepared to authorize the Bulgarian Legation to establish a commercial office in New York to promote trade, the United States shortly thereafter twice informed Bulgarian officials that only the official who would head the New York office, not others employed there, would be entitled to diplomatic immunity (*id.* at 14a-15a). The court also noted that the State Department had repeatedly reminded Bulgaria of this position in 1973 and on several occasions in 1981 and had reiterated this uniform policy to the chief diplomatic officers of all Washington embassies in 1974, 1977 and 1978 (*id.* at 16a-18a). Finally, the court observed that petitioner had never received a diplomatic identity card from the State Department and never appeared on the official government lists of persons entitled to diplomatic immunity (*id.* at 17a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Indeed, petitioner concedes (Pet. 7) that the case is one of "first impression." In addition, the conclusion reached by the court of appeals is consistent with the longstanding position of the Department of State, repeatedly conveyed to the Government of Bulgaria, that persons in petitioner's position do not have diplomatic status and therefore are not entitled to diplomatic immunity. Review by this Court therefore is not warranted.

1. Petitioner first contends (Pet. 8-11) that the United States and Bulgaria entered into a "bi-lateral agreement" in 1963 that requires that he be afforded diplomatic immunity and that the court of appeals was required to respect that "agreement" under this Court's

decisions in *United States* v. *Belmont*, 301 U.S. 324 (1937); *United States* v. *Pink*, 315 U.S. 203 (1942); and *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). We fully agree with petitioner that the courts must respect binding Executive agreements, such as those involved in *Belmont*, *Pink* and *Dames & Moore*. In this case, however, there simply is no such agreement with Bulgaria extending diplomatic status or immunity to persons in petitioner's position.

Petitioner bases his argument on a statement issued by the United States in a press release in 1963 (Pet. App. 15a), at the time the United States and Bulgaria entered into a settlement of claims of United States nationals against Bulgaria (Agreement Between the Government of the United States of America and the Government of the People's Republic of Bulgaria Regarding Claims of United States Nationals and Related Financial Matters, July 2, 1963, 14 U.S.T. 969, T.I.A.S. No. 5387; see *Dames & Moore* v. *Regan*, 453 U.S. at 680 n.9). The portion of the press release upon which petitioner relies stated (Pet. App. 15a):

> The United States is prepared to authorize the Legation of the People's Republic of Bulgaria to establish in New York a commercial office which would have the purpose of promoting trade between our two countries. Both Governments will be prepared to facilitate the travel of commercial representatives and officials interested in increasing trade.

Petitioner contends that the authorization for Bulgaria to establish a commercial office in New York, referred to in the press release, was a quid pro quo for the claims settlement sought by the United States and therefore must be viewed as part of a broader agreement that confers diplomatic immunity on him. This argument fails for two reasons.

a. The circumstances establish that the United States' decision to permit Bulgaria to open a commer-

cial office in New York in fact was not part of the Claims Settlement Agreement. The formal Claims Agreement between the two Nations regarding the settlement of claims makes no reference to the establishment of trade offices. Nor was the United States' press release regarding the New York trade office formally published in connection with the Claims Agreement, even though an exchange of diplomatic notes on other matters arising between the two Nations was published along with the Claims Agreement and registered with the United Nations (14 U.S.T. 977-982; 479 U.N.T.S. 245), as required by domestic and international law in the case of binding agreements.[4]

Moreover, the language of the statement on trade relations itself does not suggest that it is a formal binding agreement. It simply recites that the conclusion of an Agreement on financial claims and other matters "removes a significant obstacle to the establishment of more normal relations," that "[c]onditions for the expansion of peaceful trade have therefore been improved," and that "[i]t is the view of both Governments that the expansion of peaceful trade would be mutually beneficial" (Gov't C.A. App. 183). It was in this climate that the statement then proceeded to announce that the "United States is prepared to authorize" the Bulgarian Legation to establish a New York commercial office to promote trade (*ibid.*). This language is nothing more than unilateral expression of intent by the United States as part of the evolving dialogue and relations be-

[4] This publication was made pursuant to 1 U.S.C. 112a, which requires the publication in U.S.T. of treaties and international agreements other than treaties that have been "signed, proclaimed, or with reference to which any other final formality has been executed." Article 102 of the United Nations Charter (59 Stat. 1052) requires that all international agreements be registered with the Secretariat of the United Nations and published by it.

tween the two Nations, expressing the hope that trade and peaceful relations would be furthered as a result. It does not state that the United States had "agreed" in a binding fashion to the opening of a trade office, let alone one whose officials would have full diplomatic status.

Finally, the diplomatic history of the Claims Settlement Agreement refutes the suggestion that the press release on trade relations was actually part of the Agreement. Consistent with the desire of the United States to confine the Agreement to the matter of claims settlement, the Government of Bulgaria agreed to eliminate the words "to improve also their economic relations" from the preamble to the Claims Settlement Agreement (Gov't C.A. App. 202). Contemporaneous State Department documents also explain that the statement on trade relations, embodied in the press release, was "not an integral part of the agreement" (*id.* at 210; see also *id.* at 193, 200). The diplomatic history, like the language of the press release itself, instead shows that the Claims Settlement Agreement had simply removed an obstacle to improved trade relations, including the establishment of a Bulgarian trade office in New York, and that the statement expressed the United States' "favorable attitude" toward improved trade relations (Gov't C.A. App. 188-189, 195, 196, 200, 210). These characterizations refute the suggestion that the United States had formally stipulated to the opening of a New York trade office as part of a binding international agreement enforceable by a court.

b. Assuming arguendo, however, that the 1963 press release constituted or memorialized a binding bilateral agreement to permit Bulgaria to open a New York trade office, that agreement still would have no bearing on this case because it does not purport to confer diplomatic status or immunity on persons who might work in

that office. In fact, the statement does not even address those questions.

Moreover, shortly after issuance of the press release in 1963 and again in early 1964, the United States notified Bulgaria that only the Bulgarian Commercial Counselor in Washington, who also heads the New York office, would be entitled to diplomatic immunity. No one else employed in the New York office would be so entitled. Pet. App. 15a.[5] Bulgaria was reminded of this policy in early 1973 (Pet. App. 16a & n.14) and again in 1974, 1977 and 1978, when the United States by circular notes to all embassies in Washington reiterated its policy that all mission personnel entitled to diplomatic privileges, except the senior economic, financial and commercial officers in New York, must reside in the Washington, D.C. area (Pet. App. 16a).

The position of the United States following Bulgaria's sending of petitioner to replace a commercial counselor in New York in 1979 was the same. In January 1981, the State Department restated its position in connection with another counselor in Bulgaria's New York trade office (Gov't C.A. App. 130). In April 1981, following the arrest in Los Angeles of a Bulgarian trade office employee, the State Department again notified Bulgaria of its policy that only the head of the New York office was accredited as a member of the diplomatic staff and accorded privileges and immunities un-

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[5] As a policy matter, the Department of State requires diplomatic missions to be located in the District of Columbia to prevent the proliferation around the country of offices and individuals with diplomatic status (Pet. App. 18a n.19). It recognizes, however, that New York is an appropriate place to maintain an office for countries desiring to expand trade with the United States. To accommodate these two objects, the United States has allowed such New York offices to be established, but without extending diplomatic status to anyone employed in them except for the ranking commercial, economic, or financial officer (Pet. App. 14a).

der the Vienna Convention (*id.* at 131). And in May 1981, a high-ranking Bulgarian official specifically acknowledged that his government understood that the United States "considered only [the] chief of [the] trade mission in New York to be [a] member of [the] diplomatic staff of [the] embas[s]y," although the Government of Bulgaria urged a contrary position (*id.* at 134).

This record, beginning contemporaneously with the issuance of the press release in 1963, conclusively refutes any suggestion that the United States intended the press release to confer diplomatic immunity on commercial officers in New York, such as petitioner, or that the Government of Bulgaria might have believed that the United States was of that view.[6] In these circumstances, petitioner had ample notice that he would be subject to criminal prosecution if he engaged in acts of espionage against the United States. In any event, the court of appeals' concurrence with the State Department's construction of the press release pertaining to trade relations with a single country does not warrant review by this Court.

2. Petitioner also contends (Pet. 12-19) that the Vienna Convention on Diplomatic Relations requires the United States to grant him immunity from prosecution. However, this argument in turn rests on the premise that the 1963 press release required the United States to treat commercial officers in the Bulgarian trade office in New York as full members of Bulgaria's diplomatic mission entitled to diplomatic immunity. See

[6] This consistent position also defeats petitioner's claim (Pet. 18 n.*) that the United States accepted him as a member of the staff of the mission entitled to diplomatic immunity. The United States government issued petitioner an A-2 visa, which does not necessarily confer diplomatic immunity. See 8 U.S.C. 1101(a)(15)(A)(i) and (ii); 22 C.F.R. 41.12. Moreover, after his arrival, petitioner's name never appeared on the blue or white lists that identify those individuals who have diplomatic immunity. Pet. App. 17a.

Pet. 13, 17, 18. As we have explained, that premise is plainly in error.

If the press release is therefore disregarded, it is clear, as the court of appeals held, that the Vienna Convention itself does not require that assistant commercial counselors such as petitioner be accorded diplomatic status or immunity. Article 11 expressly permits the receiving state to require that the size of a mission be kept within reasonable limits and, on a nondiscriminatory basis, to refuse to accept officials of a particular category (Pet. App. 57a). As the court of appeals explained (Pet. App. 19a):

> The United States did precisely what Article 11 permits. It limited the size of the Bulgarian mission by refusing to accept as members of that mission officials of a certain category, namely, assistant commercial counselors based in New York. Furthermore, it did so on a nondiscriminatory basis.

Moreover, Article 12 provides that the sending state may not establish offices forming part of the mission in localities other than those in which the mission itself is located without the consent of the receiving state (Pet. App. 58a). Consistent with this authority, the United States has consented to the establishment by Bulgaria of a trade office in New York, but on the understanding that only the head of that office, not its other employees, will be regarded as members of the mission entitled to diplomatic immunity. Indeed, petitioner concedes (Pet. 14) that the background of the Vienna Convention shows that not all persons performing commercial functions would automatically be covered by the Convention and entitled to diplomatic immunity under it, but rather that only those members who were part of the diplomatic mission would be covered. In the instant case, the United States has consistently made clear that employees in the New York trade office are

not regarded as part of the diplomatic staff entitled to diplomatic immunity (Gov't C.A. App. 127, 129, 130, 131, 132, 135).

In addition, Article 12 reflected then current international practice, as was reported to the Secretary of State by the United States delegation to the Vienna Conference. Since 1939, the only foreign diplomatic officers the United States had permitted to reside in New York were the ranking commercial, economic, or financial officers (Pet. App. 11a), an arrangement that presumably was thought to be consistent with international practice; and the background of the Senate's ratification of the Convention reflects the understanding that members of trade missions would not be covered (Sen. Exec. Rep. 6, 89th Cong., 1st Sess. 10 (1965), quoted at Pet. App. 11a n.8). That practice, as we have shown, continued after the Convention entered into force in the United States in 1972 and continues to this day. This construction of the Convention by those charged with its implementation is entitled to great weight. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982). Petitioner's effort to overturn this longstanding construction is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1984

No. 84-35

IN THE

Supreme Court of the United States

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PENYU BAYCHEV KOSTADINOV,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Introduction

At the very beginning of its brief the Government makes the following statement:

> 2. The district court granted petitioner's motion to dismiss the indictment, concluding that because, in its view, the New York trade office in which petitioner worked was part of the premises of the Bulgarian embassy, his title "assistant commercial counselor" makes him a member of the staff of the "embassy" and entitles him to diplomatic imunity.

Gov't. Br. at 3.

That statement is inaccurate and misleading. The District Court made no such finding. It did not find petitioner was entitled to immunity because he worked in the "premises" of the mission. It found that he was entitled to immunity under the Vienna Convention on Diplomatic Re-

lations as a member of the administrative and technical staff of the mission, notified to and accepted as such by the United States. Pet. App. at 44a-49a.

The Government compounds the confusion by stating that:

> the court of appeals concluded that petitioner in fact is not a member of the Bulgarian "mission" for purposes of the immunity conferred by the Vienna Convention.

Gov't. Br. at 4.

Under the Vienna Convention, it is not possible to be a member of a mission and at the same time be denied the immunities provided for members of the mission.

The Court of Appeals has misread the District Court's findings and, as a consequence, has misinterpreted the applicable provisions of the Vienna Convention. The Government's arguments are premised upon these errors of fact and law.

ARGUMENT

1. The Government argues that the petitioner relies upon a portion of a press release issued by the United States to support his contention that the United States and Bulgaria entered into a binding international compact which authorized the Bulgarian mission to establish the Office of Commercial Counselor in New York as an integral part of the mission. Nothing could be further from the truth.

In the first place, the portion of the press release quoted by the Government is torn out of context. The complete statement on this subject made by the United States is the diplomatic note delivered by the United States Legation in Sofia to the Ministry of Foreign Affairs of Bulgaria and the accompanying Statement on U.S.-Bulgarian Trade Relations which refers to:

> The conclusion of an agreement on financial claims and related issues between the United States of America and the People's Republic of Bulgaria.

Pet. App. C at 82a.

Equally misleading is the Government's description of the "Statement and Other Matters." Gov't. Br. at 7. The Statement on U.S.-Bulgarian Trade Relations refers to "an agreement of financial claims *and related issues*" (emphasis supplied).

The Government concedes that the United States authorized the Bulgarian Legation to open a commercial office as an integral part of the mission. It contends, however, that this authorization did not constitute a binding international obligation because it was not an integral part of the claims settlement agreement.

The petitioner does not argue that it is a part of the text of the claims settlement agreement but rather that the authorization to open the commercial office as part of the mission is incident to the claims agreement. They are interdependent. Neither agreement would have been entered into without the other. That is what the record shows and what the District Court found after extensive hearings including oral and documentary evidence. In the State Department documents, the authorization to open the commercial office as part of the mission is described as a constituting "an associated feature of the general settlement". Gov't. C.A. App. at 192. The statement authorizing the opening of the commercial office as part of the mission was described by the State Department as "one of the bargaining levels used in the negotiations". Gov't. C.A. App. at 200.

The letter of the United States Minister to Bulgaria (signatory of the agreement) transmitting the documents to the State Department included the authorization as part of the interdependent agreements, as follows:

after the Bi-lateral Agreement, deprive the petitioner of the immunities accorded him under the Vienna Convention.* Such unilateral actions cannot cancel the treaty obligations assumed by the United States. A treaty cannot be changed without the express consent of both parties. The State Department cannot contract or expand a treaty. *Samann* v. *Commissioner of Internal Revenue*, 313 F.2d 461 (4th Cir. 1963); *The Society for the Propagation of the Gospel in Foreign Parts* v. *New Haven*, 8 Wheaton 464 (1823). Nor can inadmissible evidence such as post-treaty conversations be used to alter a convention. These conversations have nothing to do with the state of mind of the treaty negotiators; they merely purport to express later views of the State Department. This Court has refused to accept such evidence in interpreting a treaty. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184 n.3 (1981).**

3. The Government argues that if the express consent of the United States that authorized the opening of the commercial office as part of the mission is disregarded, the Vienna Convention does not require that the petitioner be accorded immunity from criminal prosecution. We do not understand how the express consent can be disregarded since the Government concedes that the commercial office is part of the mission even while disagreeing that the authorization is part of an international compact. In making this argument the Government echoes the Court of Appeals in misinterpreting Article 11 of the Vienna Convention.

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* At one point, the Government asserts that these representations were made "contemporaneously with the issuance of the press release in 1963" Gov't. Br. at 10. That assertion is at variance with the record and contradicts the Government's own statement of the facts. Gov't. Br. at 5 and 9.

** The State Department's policy with respect to the location and immunities of the personnel of the commercial offices of other missions (see Gov't. Br. at 9 n.5), is not pertinent. As this Court has pointed out, each treaty must be interpreted in the light of its own negotiating history. *Sumitomo Shoji American, Inc.* v. *Avagliano, supra,* 457 U.S. at 185 n.12.

This argument fails for several reasons. In the first place, as the District Court found, the United States never limited the size of the Office of the Commercial Counselor. Secondly, Article 11 has nothing to do with the immunity status of the personnel to missions and thus it cannot be used as a source of authority for denying immunity to a person who, in compliance with Article 10, has been accepted as a member of the staff of the mission and has not been declared *persona non grata* or not acceptable under Article 9. Petitioner's view is also supported by the Report of the United States Delegation to the United Nations Conference on Diplomatic Intercourse and Immunities, Department of State Publication 7289, International Organization and Conference Series 24, released February 1962. That report, which in its Conclusions states that it reflects the position as formulated in the Department of State, makes clear in Section I. Diplomatic Intercourse in General that Articles 2 to 12 of the Vienna Convention

> relate to the establishment of diplomatic relations between States, the functions of the mission, its size, the location of its offices, the appointment by the sending State of members of the mission, and their acceptability to the receiving State.

They do not relate to the subject of personal privileges and immunities. That subject is dealt with in Articles 29 through 38, under a subsection of the report entitled Personal Privileges and Immunities of Diplomatic Agents.

The Government does not really challenge this conclusion. It argues that the representations of the State Department subsequent to the Bi-lateral Agreement defeat the claim that the petitioner was accepted (a contention which we have shown is contrary to law and is inconsistent with the terms of the Vienna Convention to which no reservation has been made, *supra*, pp. 5-6) and that the issuance of an A-2 visa to the petitioner did not "necessarily" confer diplomatic immunity.

On the subject of the A-2 visa, the flaw in the Government's argument is that it is an abstraction. Perhaps under certain circumstances the granting of the visa would not "necessarily" confer immunity. But there is nothing abstract about the facts of this case. The State Department, on four separate occasions, granted A-2 visas to the petitioner in acceptance of his applications in which he informed the Department that they served for the purpose of his employment as a member of the staff of the mission at the Office of Commercial Counselor in New York. As the District Court found, the notification and acceptance were in conformity with Article 10 of the Convention as well as with the procedures of the State Department. *United States* v. *Dizdar,* 581 F.2d 1031 (2d Cir. 1978).

The failure of the United States to publish the agreement authorizing the establishment of the commercial office as part of the mission in the Treaties in Force in compliance with its obligations under law cannot change the existence of the international compact nor can its failure to include the petitioner in the White List, deny him the immunities to which he is entitled under the Vienna Convention. *Cf. Trost* v. *Tompkins,* 44 A.2d 226 (Mun. Ct. App. D.C. 1945); *United States* v. *Dizdar, supra.**

4. Because of the importance of this case to the development of international law, it is vital that the Court grant review. This case involves issues of first impression with respect to the interpretation of the Vienna Convention. The decision of the Court of Appeals denying the character of the Bi-lateral Agreement as a binding international compact is in conflict with the decisions of this Court in

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* That non-inclusion in United Nations publications does not change the legal effect of an international compact between states is made clear by Article 3 of The Vienna Convention on the Law of Treaties, 63 Am. J. Int'l. Law 875, 876, the text of which is reprinted in the Appendix to this brief.

Pink, Belmont, Weinberger v. *Rossi* and *Dames & Moore* v. *Regan,* as well as the decision of the Fourth Circuit in *Arlington,* which elucidated the doctrine of this Court in a context similar in principle to this case.* Clarification by this Court is also essential in light of the fact that the State Department's views, as expressed to the courts below, have been contradictory. In the District Court, it contended the United States never authorized the establishment of the commercial office in New York as part of the Bulgarian mission. In the Court of Appeals, it withdrew from that position and conceded what it had denied in the District Court, but refused to recognize the authorization as an international compact. Further, the Government's interpretation of Article 11 of the Vienna Convention is in conflict with the clear language of the Vienna Convention and with the view of the leading authority whose article on the subject was introduced by the Government. It is also in conflict with the report to the Secretary of State of the United States Delegation to United Nations Conference on Diplomatic Intercourse and Immunities.

It is in these circumstances that this Court should assess the proposition advanced by the Government that the construction of the Convention by the State Department is entitled to great weight. The District Court did give great weight to the State Department's construction. It encouraged the introduction of all available documentation and testimony and it came to the conclusion that the Department's interpretations of the two international compacts were incorrect. The Court of Appeals paid practically no regard to the record with respect to the Bi-lateral Agreement and, in consequence, accepted the interpreta-

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* *United States* v. *Pink,* 315 U.S. 203 (1942); *United States* v. *Belmont,* 301 U.S. 324 (1937); *Weinberger* v. *Rossi,* 456 U.S. 25 (1982); *Dames & Moore* v. *Regan,* 453 U.S. 654 (1981); *United States* v. *County of Arlington,* 669 F.2d 925 (4th Cir.), *appeal dismissed, cert. denied,* 459 U.S. 801 (1982).

tions of the State Department, which have been inconsistent, ambiguous and contradictory.

Only this Court can settle these issues of widespread importance.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Dated: September 24, 1984

APPENDIX

Vienna Convention on the Law of Treaties

Article 3

International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between states and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) the legal force of such agreements;

(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(c) the application of the Convention to the relations of states as between themselves under international agreements to which other subjects of international law are also parties.